Petition

Office-Supreme Court, U.S.
FILED
OCT 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-752

IN THE

Supreme Court of the United States

October Term, 1981

HUGH L. CAREY, EDWARD I. KOCH, ALAN CHOU, ROSE L. DAWSON, SHMUEL LEFKOWITZ, MICHAEL LOIZOU, EDWIN MARTINEZ, WALTER E. MARX, BRUNILDA PACHECO, LAMUEL STANISLAUS, THE STATE OF NEW YORK, AND THE CITY OF NEW YORK,

Petitioners,

—against—

MALCOLM BALDRIGE, Secretary of Commerce, BRUCE CHAPMAN, Director, Bureau of the Census, WILLIAM F. HILL, Regional Director, New York Region, Bureau of the Census, RICHARD BITZER, Acting Assistant Regional Director, New York Region, Bureau of the Census, ARTHUR G. DUKAKIS, Regional Director, Boston Region, Bureau of the Census, UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, RONALD REAGAN, President of the United States, EDMUND L. HENSHAW, JR. Clerk of the United States House of Representatives,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(List of Counsel on inside cover)

October 19, 1981

FREDERICK A. O. SCHWARZ, JR.
ROBERT S. RIFKIND,
CRAVATH, SWAINE & MOORE
Attorneys for all petitioners except Hugh L. Carey and the State of New York
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

JOHN A. REDMON
DANIEL J. DANSER
DAVID A. BARRETT
ELLEN S. ORAN

ROBERT ABRAMS
Attorney General of The State of New York
Attorney for Hugh L. Carey and The State of New York
Two World Trade Center
New York, N.Y. 10047
(212) 488-7511

PETER BIENSTOCK
DANIEL BERGER

ALLEN G. SCHWARTZ
Corporation Counsel of The City of New York
Attorney for The City of New York and Edward I. Koch
100 Church Street
New York, N.Y. 10007
(212) 566-3300

MARY MCCORRY

Of Counsel

QUESTIONS PRESENTED

1. Does the constitutional requirement that the House of Representatives be apportioned based on the population of each state as determined by the Decennial Census impose a duty on the United States Census Bureau to count "as nearly as is practicable" the "whole number of persons in each state"? and

(a) Assuming there is such a requirement, does a Census that failed to count hundreds of thousands of people in New York meet that requirement?

(b) Assuming there is such a requirement, is it judicially enforceable?

(c) Assuming a right to judicial review of Census accuracy, and given both the importance of the constitutional rights at stake and the entry of a protective order which effectively safeguards any legitimate interest in Census confidentiality, does the Census Act preclude an injured party from obtaining access to address lists which are concededly critical to proof of—and which have in the past demonstrated—significant Census inaccuracy?

2. Do jurisdictions outside of New York have any judicially cognizable interest in the inaccuracy of the Census in New York?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iii
Prior Opinions	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	
1. Introduction	2
2. The Disproportionate Racial Undercount	5
3. Proceedings in the District Court	
(a) The Preliminary Injunction	6
(b) The Bureau's Refusal To Make Discovery	6
(c) The Trial	7
The Endemic Undercount	7
The Bureau's Mismanagement of the Census in New York	9
(d) The Decision of the Second Circuit After Trial	11
Reasons for Granting the Writ	13
I. Whether the Constitution Creates a Judicially Enforceable Right to an Accurate Census Is a Question of Fundamental National Importance	14
A. This Petition Raises Important and Interrelated Questions Which Should be Decided at the Earliest Possible Time	14
B. The Second Panel's Decision, which Effectively Renders Challenges to the Census Non-Justiciable, Is Inconsistent with This Court's Apportionment Decisions and is in Conflict with Other Census Cases	17
1. Absent Jurisdictions have no Judicially Cognizable Interest in this Case	19
2. The Consequences of the Second Panel's Error	20
II. The Conflict Among the Circuits Regarding the Discoverability of Census Documents Should Be Resolved on the Fullest Possible Record	24
Conclusion	26

TABLE OF AUTHORITIES

	Page
CASES:	
Baker v. Carr, 369 U.S. 186 (1962)	13, 17, 18, 24
Baldrige v. Shapiro, No. 80-2466 (3rd Cir. December 1, 1980), *cert. granted*, 49 U.S.L.W. 3806 (U.S. April 27, 1981) (No. 80-1436)	24, 25, 26
Brown v. Board of Education, 347 U.S. 483 (1954)	24
Cohen v. Beneficial Industrial Loan Co., 337 U.S. 541 (1949)	7
Commissioner v. Estate of Bosch, 387 U.S. 456 (1967)	15
Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1948)	15
In re Attorney General, 596 F.2d 58 (2d Cir.), *cert. denied*, 444 U.S. 903 (1979)	7
John Hancock Mutual Life Ins. Co. v. Bartels, 308 U.S. 180 (1939)	15
McNichols v. Klutznick, 644 F.2d 844 (10th Cir. 1981), *cert. granted sub nom. McNichols v. Baldrige*, 49 U.S.L.W. 3931 (U.S. June 15, 1981) (No. 80-1781)	12, 24, 25, 26
Maggio v. Zeitz, 333 U.S. 56 (1948)	15
Park & Tilford, Inc. v. Schulte, 160 F.2d 984 (2d Cir. 1947)	21
Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968)	20
Scarborough v. United States, 431 U.S. 563 (1977)	15
Wesberry v. Sanders, 376 U.S. 1 (1964)	14, 15, 19
Young v. Klutznick, No. 80-1751 (6th Cir. June 15, 1981), *petition for rehearing denied*, September 22, 1981	18
CONSTITUTIONAL PROVISIONS:	
U.S. Const. Art. I, § 2	2, 4, 14, 19
U.S. Const. Art. II, § 1	2, 4
U.S. Const. Amend. XIV, § 2	2, 4, 14
U.S. Const. Amend XV, § 1	2

	Page
STATUTES AND RULES:	
5 U.S.C. § 702	2
13 U.S.C. § 9	2, 7, 12, 14, 17, 24, 25
13 U.S.C. § 23(c)	2, 7
13 U.S.C. § 141	2
13 U.S.C. § 181	2
13 U.S.C. § 195	2
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1292(b)	7
28 U.S.C. § 1331	2
28 U.S.C. § 1337	2
28 U.S.C. § 1361	2
28 U.S.C. § 1407	21
28 U.S.C. § 2201	2
28 U.S.C. § 2202	2
Fed. R. Civ. P. 19	20
Fed. R. Civ. P. 34	25
Fed. R. Civ. P. 37	2, 7
Supreme Court Rule 17	19
Supreme Court Rule 40	1
LEGISLATIVE HISTORY:	
S. Rep. No. 119, 22nd Cong., 1st Sess. 4, 7 (1832)	15
OTHER AUTHORITY:	
H. Alterman, *Counting People* (1969)	5
3B J. Moore, *Federal Practice* ¶¶ 24.16(1), 24.16(4)	21
National Academy of Sciences, *Counting the People in 1980* (1978)	8
U.S. Bureau of the Census, *Issues in Adjusting for the 1980 Census Undercount* (1981)	5

No.

IN THE
Supreme Court of the United States
October Term, 1981

HUGH L. CAREY, *et al.*,
*Petitioners,**

—against—

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, *et al.*,
*Respondents.***

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Hugh L. Carey, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 12, 1981.

PRIOR OPINIONS

The decision of the Second Circuit reversing the judgment of the district court and remanding for a new trial is reported at 653 F.2d 732 and is printed in the Appendix at page I-1. An earlier Second Circuit decision, affirming the district court's preliminary injunction, is reported at 637 F.2d 834 and printed at page H-1.

* Petitioners are the State and City of New York, their Governor and Mayor and eight voters who reside in districts that were severely undercounted during the 1980 Census.

** Pursuant to Supreme Court Rule 40, the incumbents in the offices of Secretary of Commerce, Director of the Bureau of the Census and President of the United States have been substituted for their predecessors, defendants in the action below.

Three opinions of the United States District Court for the Southern District of New York (Werker, J.) are reported at 508 F. Supp. 404; *id.* at 416; and *id.* at 420 and printed at pages B-1, C-1 and D-1. Two unreported orders of the district court appear respectively at pages F-1 and G-1.

This Court's order, entered December 30, 1980, staying in part the district court's final judgment is reported at 101 S. Ct. 799 and printed at page K-1.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1981. The time to seek rehearing from that judgment expired on June 26, 1981, but respondents obtained an extension of time to seek rehearing. A petition for rehearing filed by respondents and a petition for rehearing en banc filed by petitioners were both denied on September 10, 1981 (J-1). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved in this case are Art. I, § 2, Art. II, § 1, Amend. XIV, § 2 and Amend. XV, § 1. The statutes and Federal Rule involved are 13 U.S.C. §§ 9, 23(c), 141, 181, 195 and Fed. R. Civ. P. 37. Pertinent provisions thereof are set forth in the Appendix at pages A-1 to A-4.

STATEMENT OF THE CASE

1. **Introduction.** This case presents fundamental questions concerning the Federal judicial power to enforce the constitutional mandate of equality of representation in the political process. The district court, on the basis of this Court's "one-man, one-vote" decisions, held that the Constitution creates a judicially-enforceable right to a Decennial Census which counts, "as nearly as is practicable", the whole number of persons in each state.*

* The district court's jurisdiction was invoked under 28 U.S.C. §§ 1331, 1337, 1361, 2201, 2202 and 5 U.S.C. § 702.

On respondents' first appeal to the Second Circuit challenging the district court's grant of preliminary relief to petitioners, respondents (hereinafter "the Bureau") claimed that petitioners lacked standing; that their claim was not justiciable; and that the case presented a political question. On the merits, respondents contended that the Constitution imposes on the Census Bureau no standard of accuracy whatsoever; that the Constitution and the Census Act preclude the Bureau from adjusting its "headcount" figures in any way no matter how inaccurate they may be; and that, in any event, the decision whether to correct a Census undercount was committed to agency discretion. In its initial opinion, the Second Circuit rejected each of the Bureau's threshold defenses (H-7 to H-10), affirmed the district court's preliminary injunction, and held that the "public interest . . . requires obedience to the Constitution and to the requirement that Congress be fairly apportioned, based on accurate census figures". (H-10 to H-11).

After an eight-day trial, the district court, citing evidence that the 1980 Census had missed approximately one million people in New York (D-14 to D-15)—almost the population of two congressional districts—held that New York's population had been substantially undercounted and ordered the Bureau to provide more precise figures on the magnitude of the undercount and to implement a "reasonable and scientifically valid" method to correct its gross error in New York (D-23 to D-25). The court did not, however, direct the Bureau to add any specific number of persons to New York's Census count or even to adopt any particular method or procedure for remedying its grossly inaccurate count. Indeed, the court was unable to order any precise adjustment because the Bureau had previously defied a court order to produce documents which it conceded would substantially facilitate this task and had delayed its compliance with the Court's preliminary injunction, which was designed, in part, to provide a more exact measure of the number of people missed in New York in 1980.

The Bureau appealed again and a different panel of the Second Circuit reversed (I-1). If permitted to stand, the ruling of the second panel will effectively preclude further judicial inquiry into the accuracy of the Decennial Census and thus, as a practical matter, substantially curtail the power of the federal

courts to enforce the constitutional guarantee of one-man, one-vote.*

The central issues in this case are thus starkly put: In a constitutional scheme where the legitimacy of Government turns on equality of access to the political process, are this Court's "one-man, one-vote" decisions to be eviscerated by use for apportionment of Census figures which have only the most tenuous relationship to reality? Is the omission from the Census of vastly disproportionate numbers of this nation's Blacks, Hispanics, aliens and urban poor to go unremedied? And can a Census which (as even the Bureau now admits) missed hundreds of thousands of New Yorkers be immune from judicial scrutiny?

The significance of these omissions—the so-called "undercount"—can scarcely be overstated, for the Decennial Census is a key instrument for the allocation of political rights under the Constitution. On the Census rests the constitutional plan for the direct election of the House of Representatives "by the people of the several states" with representation apportioned among the states "according to their respective numbers" (Art. I, § 2, Amend. 14, § 2); the Great Compromise, which accomodated the conflicting interests of the original large and small states; and the allocation of power in presidential elections through the electoral college (Art. II, § 1). Ultimately, the constitutional guarantee of equal votes for equal numbers of people—the very foundation of political democracy—depends on the accuracy of the Census.

Notwithstanding the critical function that the Decennial Census serves in the constitutional plan, the actual work of the Bureau has not previously been subject to the probing scrutiny which the 1980 Census cases have brought to bear on its operations. No other executive bureau—and certainly none of comparable importance—has been left so long to its own

---

* At a status conference on September 24, 1981, convened to discuss the possibility of a retrial under the conditions contemplated by the Second Circuit, the district court stated that retrial was "impossible" under the conditions set forth in the Second Circuit's decision (Tr. at 3). Both Petitioners and Respondents agreed (*Id.* at 4, 8). *See* n. ** at p. 12 *infra.*

devices. As this case has shown, the reputation for accuracy which the Bureau has long enjoyed is largely a myth. And however rational its procedures may appear on paper, the Census in fact discriminates against Blacks, Hispanics, new immigrants and the urban poor generally. These fundamental problems having been brought to light, this Court should conclude that the judicial power of the United States is capable of redressing the injustice now exposed and preventing it in future Decennial Censuses.

2. **The Disproportionate Racial Undercount.** Although not widely known until the 1980 Census, it is an historical fact that in virtually every Census an undercount has occurred, and minorities have invariably been missed at rates far exceeding those for Whites.* In early Censuses, Blacks suffered overt discrimination and, under the original Constitution, were counted as only three-fifths of a person. De jure discrimination faded after the Civil War; de facto, the disproportionality of the Black undercount did not.** Thus, in 1950, 1960 and 1970, Blacks were missed at a rate approximately four times greater than Whites (*e.g.*, in 1970, 7.7% compared to 1.7%). In the 1980 Census, this disproportionality worsened. The Bureau's own studies indicate that there was a net *overcount* of the White population caused by erroneous double counting often related to affluence (*e.g.*, country homes; children away at school or college). At the same time, Black males were missed at a 7.5% rate and Black females at a rate of 2.1%. U.S. Bureau of the Census, *Issues in Adjusting for the 1980 Census Undercount* at 24 (1981). Hispanics, other minorities, aliens and the urban poor generally are also disproportionately missed by the Bureau.

The Census Bureau itself recognized the seriousness of the undercount in the 1970 Census. The Bureau estimated that the undercount in 1970 was 5.3 million, but this was only after the Bureau had used statistical adjustment techniques to add 4.9 million people to its "official" population totals for apportionment and revenue sharing. Some of those "imputations" were national, based upon a statistical sample of housing units which Bureau enumerators had erroneously classified as "vacant";

---

* H. Alterman, *Counting People* (1969).

** *Id.* at 262-78.

others were limited to 16 southern states where particular problems had arisen, resulting in the addition of more than 1 million persons to their population totals based on a sample of 16,000 households. Yet in 1980, the Bureau claimed that use of similar adjustment techniques would be unlawful.

3. **Proceedings in the District Court.**

(a) *The Preliminary Injunction.* On the basis of extensive deposition testimony and affidavits—many from the Bureau's own employees, who described gross omissions from the New York Census—the district court ordered the Bureau to check a computerized file of New York City public assistance recipients against Census records and to report how many were missed. Ultimately, the Bureau conceded that its sample analysis showed it had missed at least 8.5% of the 1.2 million persons on the list.*

The Bureau refuses to this day, however, to include even those specifically-identified omitted persons in the New York Census totals.

(b) *The Bureau's Refusal to Make Discovery.* Well before trial, petitioners requested production of address lists showing which of New York's housing units had been counted, which missed, and which inaccurately classified as "vacant".** The Bureau conceded the relevance of these documents; indeed it admitted that they constituted "the way" to determine whether "problems" in the Census had been solved and provided the "control" on Census accuracy. Moreover, when the Bureau—acting inconsistently with its position here that the lists are absolutely confidential—disclosed precisely such documents to officials in upstate New York, it turned out that over 70% of the housing units listed in one area by Census enumerators as "vacant" were in fact occupied. But despite the admitted relevance of the lists, and their obvious value as a tool to

---

* For various methodological reasons, this 8.5% figure is substantially too low—but still far too high for the courts to ignore.

** This information is contained on a Followup Address Register ("FAR"), on a form indicating when a unit is vacant ("D-160"), and on lists compiling D-160 forms. Except for individual census questionnaires, which petitioners did not request, no other documents contain this information.

improve the count, the Bureau refused to produce them when sought by petitioners, claiming they were absolutely privileged under 13 U.S.C. § 9.

When the district court ordered production, it imposed broad protective provisions to safeguard all legitimate Census confidentiality interests that could conceivably relate to the various address lists (F-4 to F-5). The order allowed redaction of names of Census respondents to protect their privacy, prohibited petitioners from using the lists other than to help ensure an accurate Census count, and required that anyone given access to the lists be sworn to confidentiality, as specifically contemplated in 13 U.S.C. § 23(c).

Despite these protections, the Bureau adamantly refused to comply with the order. An unsuccessful attempt to appeal followed.* Finding that "defendants [had] knowingly and wilfully placed themselves in contempt", the district court then entered a preclusion order under Fed. R. Civ. P. 37 (G-1), in accordance with Second Circuit authority regarding the proper sanctions for contempt by public officials.**

(c) *The Trial.* Plaintiffs established a Census undercount in New York in two distinct ways—through proof of a racial and socioeconomically-based "endemic" undercount of New York's minority populations and through proof of gross mismanagement by the Bureau of its New York operations.

The Endemic Undercount. The first category of proof relied upon undisputed history and Bureau admissions; upon surveys establishing the miss rates for New York's population; and upon the testimony of expert demographers who described the special racial, ethnic, educational and socio-economic characteristics of New York's population and explained why it was

---

* The district court stayed its order and granted a 28 U.S.C. § 1292(b) certificate. That certification, as well as the Bureau's request for review by mandamus and under *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541 (1949), were rejected by the Second Circuit. Although the Bureau's Director then claimed he would not comply unless ordered by this Court to do so, the Bureau sought neither a stay nor review from this Court.

** *In re Attorney General*, 596 F.2d 58 (2d Cir.), *cert. denied*, 444 U.S. 903 (1979).

disproportionately undercounted. This proof established the following:

(i) Though the Bureau would have the Nation believe that the Census is an exercise in straightforward "headcounting", it is in reality an enormous survey, rife with opportunity for error (D-11 to D-12).

(ii) Blacks are missed by the Census at rates far higher than Whites, and the undercount rate for Hispanics approximates that of Blacks. It is more difficult to enumerate these groups, as well as aliens and the urban poor generally, by reason of their poverty, poor housing, lack of education, poor language abilities, and persistent fear of revealing information to the Government (D-11 to D-13).

(iii) New York has a disproportionately large number of these "hard-to-enumerate" groups, even more so in 1980 than it did in 1970 (D-13).*

(iv) Analyzing the large concentrations of "hard-to-enumerate" populations in New York and the high undercount rates associated with them, petitioners' expert demographer—a member of the Bureau's own National Academy of Sciences panel on the 1980 Census**—estimated that the 1980 undercount in New York ranged from approximately 750,000 to approximately 900,000 (D-14 to D-15). This estimate expressly disregarded any additional undercount resulting from Bureau mismanagement of Census operations in New York.

---

* Thus, for example, in 1970, even taking the Census figures without any compensation for any undercounting, Blacks and Hispanics, respectively, constituted 21% and 13% of the population of New York City and 12% and 7% of the State, as compared to 11.1% and 4.6% of the Nation. By 1980 the Bureau raised the City percentages to 25% and 19.9% and the State to 13.7% and 9.4%, as compared to 11.7% and 6% for the Nation.

** The same panel, in a 1978 report to the Secretary of Commerce, recommended that the Bureau make an adjustment for the undercount in 1980. National Academy of Sciences, *Counting the People in 1980* (1978). It also warned the Bureau that its procedures were designed and worded for "mainstream middle-class, educated family members" and not those living in teeming urban ghettos. (*Id.* at 76, 132-33.)

(v) This estimate was confirmed by statistical and survey evidence which showed an undercount in New York of between 6% and 10%, leading the district court to conclude that there had been a substantial and disproportionate undercount of New York's population in the 1980 Census (D-11 to D-16; D-21 to D-23).

(vi) The disproportionality of New York's undercount was confirmed by the fact that the Bureau's own "preferred" estimate for the "measured" "net" national undercount was 0.4% or less (D-13 to D-14).*

Solely on the basis of the evidence demonstrating the existence of this "endemic" undercount, the district court concluded that New York's population had been disproportionately undercounted, citing "conservative estimates" of between 750,000 and 900,000 people (D-14 to D-15; D-21 to D-23). The Bureau has admitted that such an undercount would be sufficient to deprive New York of at least one congressional representative.**

The Bureau's Mismanagement of the Census in New York. In addition to proving a disproportionate undercount in New York through this demographic and survey evidence, petitioners established by their second category of proof that the Bureau's conduct of Census operations in New York "was on the whole unreasonable and at times irrational", and that this mismanagement of the Census exacerbated the basic undercount in New York (D-6 to D-11; D-18 to D-21). It was only with respect to this second category of proof that the district court's findings could have been affected by the preclusion order arising from the Bureau's contempt of the discovery order. For, as respondents admitted below, the district court's

---

* The Bureau's estimate of a national undercount of between zero and 0.4% is a net rate: gross undercounting offset by gross overcounting. The district court correctly rejected the Bureau's contention that the absence of a measured net national undercount negates the existence of substantial undercounts in subnational areas such as New York (D-13 to D-14).

** *See* Supplemental Memorandum for the Applicants, on Application for a Stay Pending Appeal to the United States Court of Appeals for the Second Circuit, December 30, 1980, *Klutznick v. Carey*, No. A-567 (U.S.) at 1.

basic finding concerning the endemic undercount was "unrelated" to the proof of mismanagement. Brief for Defendants-Appellants in the Second Circuit, January 23, 1981, at 34. The mismanagement proof, however, demonstrated that the actual 1980 undercount in New York was even worse than demographic techniques, taken alone, would indicate.*

The Bureau claimed that but for the contempt sanctions imposed by the district court, it would have shown that its mismanagement problems had been corrected through "redundant" Census procedures. As noted above, however, in January 1981—after the trial and long after all Census activities had ceased—the Bureau conceded that it had missed nearly 10% of New York's welfare population, a group its witnesses had contended would in fact be counted through the use of its "redundant" procedures.**

---

* Petitioners' proof of Census mismanagement is summarized by the district court at D-6 to D-11. Some of this proof related to particular incidents—*e.g.*, a Bureau Office Operations Supervisor testified that requests for Spanish language questionnaires in his district had been put away in boxes and ignored; a Catholic Sister, responsible for a home of retired nuns in the Bronx, testified to her repeated unsuccessful attempts to have the Bureau bureaucracy count her center; local Bureau officials described the extensive falsification of questionnaires in their districts which top Bureau officials admitted leads to undercounting, etc.—but most of petitioner's proof of mismanagement was general and, indeed, based on Bureau admissions. Thus, as just one example, the Bureau knew that incomplete address lists were the major cause of the 1970 undercount. Nonetheless, as the base for the 1980 Census, it used lists purchased from vendors of commercial mailing lists who naturally had little or no interest in poor and minority neighborhoods (*e.g.*, the president of the list supplier testified his firm had mailed nothing to the South Bronx for 10 years). As the Bureau also admitted, (i) the coverage of the purchased lists for New York City was only about 59%, far short of the national goal of 80-90%, and (ii) New York's mail return rate was far below the national average; in some minority districts it was below 50%. A lower mail return rate—it is once again admitted—is likely to lead to substantially larger numbers of missed persons.

** The Bureau also complained that the contempt order prevented it from proving its actual count in New York, and, in its June 1981 opinion, the court of appeals criticized the district court for that result. Yet, the number of people the Bureau actually counted in New York simply does not and cannot rebut petitioners' showing that there were hundreds of thousands of people it did not count.

* * * *

Having found a serious constitutional violation, the district court then endeavored to fashion an appropriate remedy. Based upon petitioners' expert proof, the court held that the Bureau could statistically adjust its figures to correct undercounting errors as it had using similar methods in 1970. The court also reiterated its previous order that the Bureau comply with the preliminary injunction—which soon led to the Bureau's admission of a substantial miss rate.

It bears emphasis that the court did not order the Bureau to change its reported population figures by any specific number. The Bureau's refusal to comply with the court's discovery order had deprived the court of evidence needed to determine the precise magnitude of the New York undercount (D-23); proof at trial had also shown that certain Bureau studies likely to be useful in assessing the errors more exactly would not be completed until the remedial phase. Thus, determination of the particular adjustment necessary must await the results of the court-ordered undercount measurement and adjustment procedures. The court simply ordered the Bureau to design and implement a program to measure the undercount more precisely, and to make whatever "reasonable and scientifically valid" corrections that program reveals to be required in order to ensure that the Census in fact counts the whole number of persons in New York as nearly as is practicable (D-25).

d. *The Decision of the Second Circuit After Trial.* On appeal, respondents attacked the district court's factual findings, its discovery and preclusion orders, and again questioned petitioners' right to challenge the Census at all. Given the prior panel's decision, the court could not directly adopt the Bureau's positions on the question of justiciability and other threshold defenses; ostensibly, at least, it deemed itself "precluded from reexamining [those] issues" (I-9, n. 18). However, the views expressed by the second panel on the nature of Census litigation—and particularly its repeated suggestion that a state may not enforce its constitutional rights in a Federal court unless the interests of all other states are represented in the action—inexorably compel the conclusion that, just as the Census

Bureau maintains, the constitutional deficiencies of a Decennial Census are effectively immune from judicial review.

After extensive exposition of the thesis that a lawsuit such as petitioners' cannot, as a practical matter, be heard (*see* pp. 17-24 *infra*), the court of appeals held that the district court's discovery order was improvidently granted in light of the confidentiality provisions of 13 U.S.C. § 9. This bare conclusion was announced without any analysis of the statute, without any reference to the factual record establishing the importance of the Census documents at issue, and without any consideration of the countervailing constitutional rights at stake. Noting a conflict between the Third and Tenth Circuits, the court merely declared that it agreed with the Tenth Circuit's holding in *McNichols v. Klutznick*, 644 F.2d 844, *cert. granted sub nom. McNichols v. Baldrige*, 49 U.S.L.W. 3931 (June 15, 1981)(No. 80-1781)—itself a bare and unexamined conclusion—that the documents are absolutely immune from discovery (I-15). As an alternative ground for reversal, the court ruled that even if the discovery order were proper, the sanction imposed by the district court for respondents' contempt of that order had prejudiced what the court supposed to be interests of unrepresented jurisdictions. In this connection, the court again intimated that at least the other 49 states were indispensable parties to this lawsuit.*

Asserting that the second panel's opinion would not permit rational further proceedings in the district court, *both* sides sought rehearing. When rehearing was denied, the parties convened in a status conference before the district judge, who took the position—with which both parties concurred—that the Second Circuit's opinion had "ask[ed] me to do something that is impossible . . . ."**

---

* *But see* Stewart, J., concurring at I-29 to I-30.

** The district judge continued: "Judge Van Graafeiland . . . has indicated that I have to retry this and take into consideration all of the facts and factors involved in the whole of the United States of America, which I think is a physical as well as a legal impossibility." (9/24/81 Tr. at 3.)

REASONS FOR GRANTING THE WRIT

All of the traditional reasons for granting the writ of *certiorari* obtain in this case. First, the questions presented are of vital national importance, relating directly to the scope and enforceability of the constitutional guarantee of equality of representation in the political process. Respondents' principal positions are (i) that the Decennial Census need not "achieve *any* specified accuracy or other qualitative measure to pass Constitutional muster", (Brief for Defendants-Appellants in the Second Circuit, January 23, 1981, at 36-37 (emphasis supplied)); (ii) that the " 'one man-one vote' principle is not applicable to apportionment among the states", *id.;* and (iii) that even if the work of the Census Bureau must satisfy some constitutional standard, persons injured by the Bureau's failure to fulfill its mandate have no practical means for obtaining redress in a Federal court.

But the right of equal representation for equal numbers of people cannot be so cavalierly discarded. Given the fundamental importance of the Census in our scheme of representative government, challenges to the accuracy of the Census must present a justiciable controversy in which those injured have standing to complain; evidence critical to proof of injury from an inaccurate census cannot be absolutely privileged; and relief for the right denied must be available in Federal court and capable of implementation in a timely and nondisruptive fashion. It is surely in the public interest that this Court provide guidance on these fundamental issues at the earliest possible time. (Point I.A.)

Secondly, the questions presented relate to inter- and intra-circuit conflicts that require immediate resolution because of the number of pending lawsuits affected and the crucial interests at stake. As a practical matter, the decision of the second panel forecloses even the most deferential review of the Census. That panel's view of the feasibility of Census litigation is inconsistent with this Court's mandate—beginning with *Baker v. Carr*—concerning the judicial enforcement of the right of equal representation; with the decision of the prior Second Circuit panel in this case; and with the premises under which the Sixth Circuit and a number of district courts are attempting to resolve

other lawsuits arising out of the 1980 Census. Because of these inconsistencies, and the potentially horrendous procedural consequences of the second panel's decision, supervisory intervention by this Court is also appropriate. (Point I.B.)

Finally, there are currently pending in this Court two cases relating to the privilege, if any, which 13 U.S.C. § 9 affords to certain documents that are central to the proof of Census error. To decide those cases without having first ruled on the enforceability of the rights that a finding of absolute privilege would impair—and without the benefit of what is by far the most complete available record involving the 1980 Census—would be to place the cart before the horse. (Point II.)

I. WHETHER THE CONSTITUTION CREATES A JUDICIALLY ENFORCEABLE RIGHT TO AN ACCURATE CENSUS IS A QUESTION OF FUNDAMENTAL NATIONAL IMPORTANCE.

A. This Petition Raises Important and Interrelated Questions Which Should be Decided at the Earliest Possible Time.

The Constitution and laws of the United States require that a Census of the population be taken as the basis for apportionment of Representatives in Congress. Article I, section 2, as amended by section 2 of the Fourteenth Amendment, provides that each state is entitled to a number of Representatives proportional to "the whole number of persons" in that state. The constitutional purpose of the Decennial Census is to ascertain "the whole number of persons in each State" so that Congress may be apportioned, "as nearly as is practicable", in accordance with the principle of equal representation for equal numbers of people. *See Wesberry v. Sanders,* 376 U.S. 1, 7-8 (1965).* Thus, the Census provides the very cornerstone of political democracy.

---

* The standard adopted in *Wesberry* echoes the words of Daniel Webster, who wrote with respect to apportionment among the states:

> "That which cannot be done perfectly, must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be attained, then the greatest practicable approach to exactness ought to be made."

Questions of fundamental importance concerning the constitutional duties of the Census Bureau are raised in this litigation, specifically, whether the Constitution imposes upon the Bureau a duty to count "as nearly as is practicable" the "whole number of persons in each state", and, if it does, whether that duty is susceptible to judicial enforcement. The first panel of the Second Circuit to consider these issues held that the Census Bureau has such a duty; that petitioners have standing to enforce it; that questions concerning the accuracy of the Census do not constitute nonjusticiable "political questions"; and that the conduct of the Census is not "committed to agency discretion by law". The second panel, while paying lip service to these prior rulings, rendered a decision which makes judicial enforcement of the right to an accurate Census impossible.

These two decisions of the Second Circuit are inconsistent.* Indeed, the present paradoxical situation in the Second

---

"What the Constitution requires, is *the nearest practicable approach to precise justice.* The rule is approximation; and we ought to approach, therefore, on whichever side we can approach nearest." S. Rep. No. 119, 22d Cong., 1st Sess. 4, 7 (1832) (emphasis supplied).

While the precise holding of *Wesberry* was that the "one-man, one-vote" principle applies to *intra-* state Congressional districting, the Court could have reached that result only if the same principle applies to apportionment among the states.

Article I itself places constitutional limitations upon the degree to which equal representation for equal numbers of people can be achieved. It requires that (i) Representatives be apportioned "among the states" rather than strictly on the basis of national population, and (ii) that every state have at least one Representative.

In Webster's words, these are limitations upon "precise justice". But it would turn the Constitution upside down to hold that these enumerated limitations on achieving the "fundamental goal" of equal representation for equal numbers of persons render meaningless that goal itself.

* Intra-circuit conflicts can provide the basis for a grant of *certiorari,* especially where important questions are raised. *See, e.g., John Hancock Mutual Life Ins. Co. v. Bartels,* 308 U.S. 180, 181 (1939); *Dickinson v. Petroleum Conversion Corp.,* 338 U.S. 507, 508 (1950); *Maggio v. Zeitz,* 333 U.S. 56, 59-60 (1948). *See also Commissioner v. Estate of Bosch,* 387 U.S. 456, 457 (1967), *Scarborough v. United States,* 431 U.S. 563, 567 n. 4 (1977).

Circuit is that a justiciable right to an accurate Census exists, but no one can assert it. In view of the importance of the constitutional right at stake, the clear proof at trial of a violation of that right, and the number of persons affected by that violation, this result is unconscionable.

The questions noted above, which are indisputably of major national importance, have not previously been decided by this Court. They should be now. And it is particularly critical that these issues be decided at the earliest possible date. First, they are recurring questions which are basic to all of the numerous other Census actions now pending at various pre-trial stages. Much judicial time and energy can be saved by an authoritative resolution of these issues.

Second, because of the fundamental nature of these questions, delay in their resolution will have serious consequences. As respondents pointed out in their Petition for Rehearing to the Second Circuit, further delays in the resolution of this case could well have "an adverse impact on the distribution of congressional seats for the 1982 election" and "leave a continuing question as to the legitimacy of the Congress elected in 1982". And it is obvious that the longer decision on these issues is delayed, the more difficult it becomes to purge the Bureau's erroneous counts from the electoral system. As redistricting lines are drawn, congressmen are elected, and funding is distributed in reliance on these inaccurate figures, interests become entrenched. Accordingly, the sooner these issues are decided, the less complicated will be the question of relief. Moreover, once this present opportunity passes, these issues are unlikely to be raised again until 1990—the year of the next Decennial Census—at which time they will undoubtedly emerge again. They should be definitively decided now to avoid both short and long-term uncertainties.

Third, it has become clear throughout this litigation that the Bureau simply will not correct its figures—even for admitted errors such as missing at least 8.5% of New York City's welfare population—until these issues have been settled by this Court. Because this means that additional delays will follow any decision by this Court while the Bureau implements an

adjustment plan, the Bureau must be promptly apprised of its constitutional duties so that it can get on with the business of an expeditious adjustment.

Fourth, as we show in Point II, this Court has already granted *certiorari* in two cases involving the scope of the privilege, if any, conferred by 13 U.S.C. § 9, and it is important that the Bureau's claim of privilege be reviewed in the context of a full presentation on the underlying constitutional issues.

Finally, there is no reason not to resolve these important questions now. The record below is fully developed in all pertinent respects;* the issues were fully litigated and finally decided at both the district court and appellate levels; and the only effect of a retrial, even assuming one were possible, would be to bring the same issues before the Court on the same record later rather than sooner—at a time when the problems associated with the implementation of relief may loom substantially larger than they do now.

B. The Second Panel's Decision, Which Effectively Renders Challenges to the Census Non-Justiciable, Is Inconsistent with This Court's Apportionment Decisions and is in Conflict with Other Census Cases.

The second panel, throughout its decision in this case, proceeded on the assumption that the interests of absentee jurisdictions were affected by this case and that those jurisdictions were, in effect, "indispensable parties" which the district court erroneously failed to give an opportunity to be heard. This assumption, which permeates the decision below, and

---

* Some issues relating to relief require further factual development. Although the district court found that petitioners had made a sufficient *prima facie* showing of constitutional injury to warrant further inquiry by the Bureau and further proceedings on relief, the Bureau's contumacious refusal to produce critical Census documents and to comply with the district court's preliminary injunction prevented a more precise determination of the undercount in New York. The ultimate resolution of this question, however, has no bearing on the justiciability of this case, *see Baker v. Carr*, 369 U.S. 186, 208 (1962), or on the other issues noted above. Moreover, as is shown below, see discussion at p. 9 *supra* and pp. 22-23 *infra*, the preclusion order, as applied at trial, did not prevent the development of a full record on these issues.

which the panel expressly relied upon in arriving at several critical aspects of its decision, is fundamentally inconsistent with this Court's prior apportionment decisions, in conflict with other Census cases, wrong as a matter of logic, and disasterous as a matter of policy in both its substantive and procedural ramifications.

The upshot of the decision is that each of the 39,000 revenue-sharing jurisdictions in the United States must be permitted to intervene in this action if it perceives its "interests" to be "imperiled" (I-10 to I-11). This conclusion, even if limited to the 49 other states, as a practical matter insulates the Bureau from *all* judicial scrutiny and is inconsistent with literally hundreds of apportionment cases decided over the course of more than 20 years in this Court and throughout the nation. For, until this decision, no court has ever suggested that when a victim of malapportionment brings an action, the court must allow every other conceivably affected jurisdiction to intervene. Indeed, in all such cases—beginning with *Baker v. Carr* and continuing up to the present—this Court and others have proceeded without bringing in persons or jurisdictions other than those challenging the apportionment.

Moreover, the second panel's decision is, at least implicitly, in conflict with a decision by the Sixth Circuit,* as well as other Census cases now pending in a number of district courts. If the second panel is correct in its determination that decision cannot be reached in the 1980 Census cases unless each jurisdiction affords every other jurisdiction notice and an opportunity to be heard, then every other court considering these cases is wrong. To petitioners' knowledge, no other court has suggested that New York must be permitted to intervene in a local Census action; nor has New York received any notice to this effect. This Court should resolve the question to eliminate this implicit conflict between the circuits.

Putting aside this conflict, however, the clear error of the second panel, when considered in light of its devastating impact on the integrity of this Court's "one-man, one-vote" decisions, should be corrected by this Court. Moreover, the colossal

---

* *Young v. Klutznick*, No. 80-1751 (6th Cir. June 15, 1981), *petition for rehearing denied*, September 22, 1981.

procedural log jam of intervention and cross-intervention which appears to be the inevitable consequence of the second panel's decision should be averted by the exercise of this Court's supervisory powers.*

1. *Absent Jurisdictions Have No Judicially Cognizable Interest in this Case.* The second panel's error—and the attendant confusion in its opinion—stem from a fundamental misconception about the nature of this case.

The second panel viewed this action as no more than an attempt by New York to gain an unfair "advantage over other states in the competition for congressional seats and federal funds" (I-15). But the allocation of congressional representation (and Federal funding under census-based formulas) is not, in our system of constitutional government, a matter of raw political "competition". Rather, it is one of constitutional right. The court of appeals completely ignored petitioners' right under Art. 1, § 2 and *Wesberry v. Sanders,* 376 U.S. 1 (1964), to an apportionment of Congress and the state legislatures based on a Census which "as nearly as is practicable" counts the "whole number of persons" in New York. Contrary to the panel's view, New York does not seek, nor has the district court ordered, that petitioners be awarded any additional congressional seats or any larger allocation of funds. Petitioners seek no "unfair advantage". Petitioners seek only a reasonably accurate Census that does not unfairly omit hundreds of thousands of New Yorkers. Once New York has received the count to which it is entitled, any increase in representation or Federal funding that may follow will flow not from the district court's order, but from the Constitution itself.

When properly viewed, there has been no prejudice to the legitimate interests of any other jurisdictions. All states have an interest in an accurate Census. But no state, locality or individual has a legally cognizable interest in preventing another from receiving an accurate Census count; nor is there any legally cognizable interest in benefitting from congressional apportionment or Federal funding based on an erroneous Census. The district court's order does nothing more than

* Supreme Court Rule 17.1(a).

require the Bureau to implement methods to insure that petitioners receive the accurate count to which they are constitutionally entitled. The order in no way prohibits other injured jurisdictions from obtaining similar relief.*

2. *The Consequences of the Second Panel's Error.* The court of appeals' misplaced concern for the supposed unrepresented "interests" of other states in New York's population count led it to err in several ways which, taken together, make challenges to the Census impossible to raise.

(a) It led the court to conclude that the district court "should have . . . considered" four "pragmatic equitable alternatives" to the compulsory joinder of the 49 remaining states (which the court found to be infeasible). Of these four alternatives, three were clearly not available to the district court.** The fourth alternative—that of giving notice "to all

---

* This analysis reveals the fallacy of the second panel's suggestion that absent jurisdictions were "indispensable parties". First, since they have *no* interest in this litigation, indispensable party analysis is not appropriate at all. However, even assuming it were, the court below failed to apply the analysis required by Rule 19(b), Fed. R. Civ. P. and *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968).

A court, in determining whether a nonparty is "indispensable", must *balance* the potential prejudice to that nonparty from the conduct of the lawsuit in its absence against the potential detriment to the plaintiff from the loss of its forum. Here, the court, with its caricature of this case as an attempt by New York to gain an "advantage" over other states in the "competition" for political representation and funds, considered what it wrongly supposed to be the interests of absent jurisdictions. But it gave absolutely no consideration to the detriment to plaintiffs or to countervailing considerations which protected any "interests" that nonparties might have. Thus the court did not consider the importance of the constitutional rights involved; the fact that intervention by all "competing" jurisdictions would render this case *de facto* nonjusticiable; the ready availability to each nonparty jurisdiction of a forum for the vindication of its right to an accurate Census; and, most importantly, the fact that the district court's restrained order in this case fully protected the interests of absent states.

** These three "pragmatic" alternatives are as follows:

(i) "[T]o substitute Bureau and congressional review for that of the court" (I-10). This "alternative", as the court conceded, is flatly inconsistent with the Second Circuit's earlier decision that the case is justiciable.

states with permission to intervene given any state which felt its interests were imperiled" (I-10 to I-11) would, if taken seriously, so complicate and prolong the proceedings at trial as to render the case incapable of adjudication.

This is so because once some or all of these jurisdictions intervened, the scope of the trial would be expanded almost infinitely.* Indeed, accepting the second panel's premise of "indispensability", there is no reason why notice should be limited to 49 states; rather it should be required for all 39,000 revenue-sharing jurisdictions. Putting aside the hopeless procedural and administrative snarls that would result from consolidating such an avalanche of claims and claimants,** and

---

(ii) "[T]o seek multidistrict coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407" (I-11). Putting aside the fact that the Government in this case specifically rejected the idea of referring this matter to a multidistrict panel, § 1407 plainly applies solely to pretrial proceedings, which had been completed here, and could not be of assistance in connection with the substantive rights of absent jurisdictions or with relief.

(iii) To stay the "operation" of the district court's judgment pending a "definitive appellate ruling" concerning whether challenges to the 1980 Census were properly raised in fifty "separate and unrelated" actions and "whether the requirements imposed on the Bureau by the district court . . . were proper" (I-11). In fact, there was no immediate "operation" of the district court's order except to require the Bureau to report within 30 days to the court with a *plan* for correcting its counts in New York which was to initiate the remedial phase of the litigation; a plan was required promptly due to the substantial time pressures under which the litigation was proceeding; and, ironically, if the court had awaited a "definitive appellate ruling" on the issues mentioned, it would still be waiting, because no such ruling was provided by the Second Circuit. This alternative, however, does suggest the appropriateness of a prompt ruling by this Court on these issues.

* These jurisdictions, of course, would be entitled to litigate fully on the merits. *See Park & Tilford, Inc. v. Schulte,* 160 F.2d 984 (2d Cir. 1947); 3B J. Moore, *Federal Practice,* ¶¶ 24.16(1) at 24-595, 24.16(4) at 24-631.

** Of course, the confusion goes well beyond the problems in this particular action. For example, it appears from the second panel's decision that all "competing" jurisdictions should be permitted to intervene in *each* of the pending Census actions. There is certainly no reason why such intervention should be limited to the New York case. Indeed, other jurisdictions may now believe that across-the-board

assuming that trial would be possible at all, the sheer time required to put on proof in a single forum concerning the accuracy of the Census in each intervening jurisdiction would make it extremely difficult for the court to grant any meaningful relief. Because of the speed with which Census figures—once reported—are relied upon for redistricting and other purposes, the gargantuan trial envisioned by the court below would ensure that any final relief adjusting the count would be maximally disruptive. Far more sensible is a procedure—such as that followed by petitioners—in which local challenges are timely brought by officials, who do not require "notice" to conclude that they have been injured by an inaccurate count, and expeditiously resolved in separate forums, no one of which is overwhelmed.*

(b) The court's misconceptions concerning the interests of absent jurisdictions also led it to conclude that the district court's preclusion order was overbroad because it "punished . . . unrepresented States by preventing full and fair disclosure of the facts and an adjudication on the merits of plaintiffs' claims" (I-15). Thus, the court found that "the severity of sanctions should be tempered by a consideration of the equities involved" and that the equities here required "that the unrepresented states not be penalized . . . ." *Id.* As we have shown, the court's notion that absent jurisdictions are, in effect, indispensable parties to this litigation is simply wrong. Accordingly, its determination that the district court's preclusion order was overbroad due to its failure to protect these imagined interests must fail.

Moreover, the preclusion order, as applied at trial, in fact only barred defendants from rebutting plaintiffs' proof that Bureau mismanagement exacerbated the racially based undercount; the panel mistakenly assumed that the order influenced all of the district court's decision. In fact, defendants were not

---

intervention is necessary to preserve their rights. Additional problems readily suggest themselves: some jurisdictions may intervene in some cases, but not others; conflicting judgments may be entered in different forums with respect to the same jurisdiction; and so on.

* Moreover, such notice, in addition to precluding the effective adjudication of the important rights at stake here, would have been pointless in the present case. Because New York's Census litigation received substantial nationwide press coverage, it is hard to conceive that any jurisdiction was, in fact, ignorant of it.

precluded as to plaintiffs' more important claim—that a disproportionate percent of Blacks, Hispanics, and other disadvantaged groups were omitted. Thus, the district court's central conclusion that there was a disproportionate undercount in New York due to high rates of undercounting among New York's heavy concentrations of these groups was unaffected by the preclusion order. The court's decision on the feasibility of relief was similarly unaffected.

(c) The concern of the second panel for the interests of absent jurisdictions also caused it greatly to exaggerate the impact of the relief ordered by the district court. The court characterized the "question presented" by census litigation as: "whether one state can be granted . . . an increase [in congressional representation] without full consideration having been given to its effect on other States" (I-8). But the district court, far from granting New York an increase in repesentation, simply ordered the Bureau to implement a program to correct the substantial undercount which petitioners had shown to have occurred during the 1980 Census in New York. The district court did not find that the Bureau had undercounted New York by any particular number of persons. Indeed, the Bureau's contumacious refusal to produce critical evidence and to comply with the district court's preliminary injunction rendered any such finding impossible. Rather the court, in effect, found that petitioners had made a sufficient *prima facie* showing of undercounting to justify an order to the Bureau to check its work and report to the court a plan for correcting it.

The panel mistakenly assumed that the district court's remedial order meant that only New York's Census totals would be adjusted, and that such relief would unfairly affect other states that were also undercounted (I-9 to I-10). In fact, as the district court indicated, most of the undercount adjustment methods currently available are national in scope (*see* D-23 to D-24). They can be used to measure undercount rates in all states, and to correct state population totals for any state which has been similarly injured. Moreover, in the several other Census actions, various cities and states are attempting to prove such injury. These states and cities thus have forums in which they may fully protect their interests. Finally, since the relief ordered by the district court will, once implemented, inform the Bureau where undercounting has occurred, the

Bureau presumably will correct its errors without the need for additional duplicative litigation. Thus, once this Court has definitively instructed the Bureau as to its constitutional duties, any other state entitled to census adjustment will also benefit.

In sum, the fact that other states share New York's constitutional entitlement to a Census count which is as accurate as is reasonably practicable cannot be used as an excuse to deny New York its own properly asserted right. And the possibility that the Census may have been defective elsewhere cannot be asserted to evade its correction here. Violations of constitutional right cannot be excused because they are difficult to correct or disregarded because they are massive. *See Brown v. Board of Education,* 347 U.S. 483 (1954); *Baker v. Carr,* 369 U.S. 186 (1962).

II. THE CONFLICT AMONG THE CIRCUITS REGARDING THE DISCOVERABILITY OF CENSUS DOCUMENTS SHOULD BE RESOLVED ON THE FULLEST POSSIBLE RECORD.

In this and several other pending actions challenging the 1980 Census, plaintiffs have sought production of various lists of addresses used by the Census Bureau during its enumeration activities. The Bureau has refused, claiming that the documents are absolutely privileged from disclosure under 13 U.S.C. § 9. The Second Circuit's holding that the Bureau's lists of purportedly vacant housing units and other address lists are absolutely immune from disclosure is erroneous. It conflicts with the decision of the Court of Appeals for the Third Circuit in *Baldrige v. Shapiro,* No. 80-2466, *cert. granted,* 49 U.S.L.W. 3799 (U.S. April 27, 1981) (No. 80-1436). This Court has granted *certiorari* in both *Shapiro* and *McNichols v. Baldrige,* 49 U.S.L.W. 3931 (U.S. June 15, 1981) (No. 80-1781), *granting certiorari in McNichols v. Klutznick,* 644 F.2d 844 (10th Cir. 1981), on which the Second Circuit relied, to decide the question of the scope of the privilege, if any, conferred on these documents by 13 U.S.C. § 9. The Court's consideration of this important recurring issue will be better informed if undertaken with the benefit of the record in this case.

In *Shapiro,* the precise question is whether Census address lists must be released under the Freedom of Information Act.

In *McNichols,* and in this case, the documents were sought in pre-trial discovery pursuant to Fed. R. Civ. P. 34 in actions seeking a remedy for undercounting. In *McNichols,* however, petitioners seek only the Bureau's vacant housing lists, their claims of undercounting are different and of a lesser magnitude, and the action has not yet proceeded to trial. This case, on the other hand, involves both the address lists and the vacancy lists, and it presents the question against a record fully developed at the hearing on petitioners' preliminary injunction motion and at trial. That record, summarized above, includes, *inter alia,* admissions by high Census officials concerning the relevance and importance of the documents at issue; facts concerning the selective release of some of those documents; overwhelming evidence and judicial findings as to the existence of a disproportionate undercount in New York in violation of the fundamental constitutional rights of New Yorkers; and full development of the major legal issues underlying these cases.

Moreover, the discoverability of census documents and the question of whether the Bureau can be required to undertake listmatching, as the preliminary injunction in this case ordered, or to make statistical adjustments, are related in a fundamental way.* If the Bureau's work cannot be scrutinized through a review of the documents, then it should be even clearer that the courts, at the request of parties injured by undercounting, must have the power to order the Bureau itself to scrutinize and correct Census errors. Otherwise, the Bureau's work will be absolutely unreviewable, a conclusion which, given the fundamental constitutional rights at stake, is simply untenable.

Since this Court's decision on the scope of Section 9 will affect not only this action, but also several other pending actions in which the discoverability of Census documents is or may be an issue,** the Court should grant this petition and consolidate this case for oral argument with *Shapiro* and *McNichols* in order to consider the question in light of the most complete record possible.

---

* *Cf. McNichols v. Klutznick,* 644 F.2d 844, 846 (10th Cir. 1981), *cert. granted sub nom. McNichols v. Baldrige,* 49 U.S.L.W. 3931 (U.S. June 15, 1981).

** *See* Brief of Amici Curiae, Plaintiffs MDL-444, In Re 1980 Decennial Census Adjustment Litigation, *McNichols v. Klutznick,* No. 80-1781, July 30, 1981.

Conclusion

For the reasons stated above, this petition should be granted. Also, for the reasons stated here and in the accompanying motion, this case should be expedited and consolidated for argument with *Baldrige v. Shapiro* (No. 80-1436) and *McNichols v. Baldrige* (No. 80-1781).

October 19, 1981

Respectfully submitted,
FREDERICK A. O. SCHWARZ, JR.
ROBERT S. RIFKIND,
CRAVATH, SWAINE & MOORE
Attorneys for all petitioners except Hugh L. Carey and the State of New York
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

JOHN A. REDMON
DANIEL J. DANSER
DAVID A. BARRETT
ELLEN S. ORAN

ROBERT ABRAMS
Attorney General of The State of New York
Attorney for Hugh L. Carey and The State of New York
Two World Trade Center
New York, N.Y. 10047
(212) 488-7511

PETER BIENSTOCK
DANIEL BERGER

ALLEN G. SCHWARTZ
Corporation Counsel of The City of New York
Attorney for The City of New York and Edward I. Koch
100 Church Street
New York, N.Y. 10007
(212) 566-3300

MARY MCCORRY

Of Counsel

Supplemental Brief

81-752

No.

Office-Supreme Court, U.S.
FILED
OCT 30 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

HUGH L. CAREY, *et al.*,

Petitioners,

—against—

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTIONS OF PETITIONERS FOR CONSOLIDATION WITH *BALDRIGE v. SHAPIRO* (NO. 80-1436) AND *McNICHOLS v. BALDRIGE* (NO. 80-1781) AND TO ADVANCE FILING DEADLINES

October 19, 1981

FREDERICK A. O. SCHWARZ, JR.
ROBERT S. RIFKIND,
CRAVATH, SWAINE & MOORE
Attorneys for all petitioners except Hugh L. Carey and the State of New York
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

JOHN A. REDMON
DANIEL J. DANSER
DAVID A. BARRETT
ELLEN S. ORAN

ROBERT ABRAMS
Attorney General of The State of New York
Attorney for Hugh L. Carey and The State of New York
Two World Trade Center
New York, N.Y. 10047
(212) 488-7511

PETER BIENSTOCK
DANIEL BERGER

ALLEN G. SCHWARTZ
Corporation Counsel of The City of New York
Attorney for The City of New York and Edward I. Koch
100 Church Street
New York, N.Y. 10007
(212) 566-3300

MARY MCCORRY

Of Counsel

No.

IN THE

Supreme Court of the United States

October Term, 1981

HUGH L. CAREY, *et al.*,

Petitioners,

—against—

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTIONS OF PETITIONERS FOR CONSOLIDATION WITH *BALDRIGE v. SHAPIRO* (NO. 80-1436) AND *McNICHOLS v. BALDRIGE* (NO. 80-1781) AND TO ADVANCE FILING DEADLINES

Petitioners respectfully move this Court for an order accelerating Respondents' Brief in Opposition to their Petition for Certiorari, and, if *certiorari* is granted—as we believe it should be—an order accelerating the schedule for briefing on the merits and consolidating the above-captioned case for purposes of oral argument with two previously consolidated Census cases, *Baldrige v. Shapiro* (No. 80-1436) and *McNichols v. Baldrige* (No. 80-1781). In support of these motions, petitioners allege as follows:

1. Petitioners are the State and City of New York, their Governor and Mayor, and eight New York voters who have

instituted this suit against the United States Bureau of the Census ("Bureau") to prevent the serious constitutional injury which will be suffered if the huge undercount of the New York population that occurred in the 1980 Census is not corrected. *Carey v. Klutznick,* 508 F. Supp. 420 (S.D.N.Y. 1980), *rev'd and remanded,* 653 F.2d 732 (2d Cir. 1981), *petitions for rehearing denied,* No. 81-6042 (2d Cir. September 10, 1981).

2. *Baldrige v. Shapiro,* No. 80-1436, *cert. granted,* 49 U.S.L.W. 3799 (U.S. April 27, 1981), and *McNichols v. Baldrige,* No. 80-1781, *cert. granted,* 49 U.S.L.W. 3931 (U.S. June 15, 1981), present in slightly different contexts the question whether address lists maintained by the Bureau are immune from disclosure to litigants injured by Census errors. In *Shapiro,* the precise question before this Court, is whether Census address lists must be released under the Freedom of Information Act. In *McNichols,* the issue is whether the Bureau's lists of *vacant* housing must be disclosed in pretrial disovery in an action seeking relief from Census undercounting.

3. In its Memorandum for the Respondents in the *McNichols* case, the Government urged this Court to grant *certiorari* in that case and to consolidate it for purposes of oral argument with *Shapiro* " in order to ensure that all aspects of census confidentiality are finally resolved". By its order of August 28, 1981, the Court indicated its agreement with the goal of deciding "all aspects of census confidentiality" by consolidating *Shapiro* and *McNichols* for oral argument.

4. This case presents the question whether the Decennial Census must meet the standard of accuracy prescribed by this Court's "one-man, one-vote" decisions and, if so, whether the rights of those aggrieved by disproportionate undercounting of Blacks, Hispanics and the urban poor can be vindicated in a court of law*. The nature and extent of the racial undercount in New York is explained in the attached petition (Petition at 5-

* Under the Second Circuit's opinion, the Bureau would be free to omit from New York's Census totals even specifically identified persons whom the Bureau's analysis of New York City's public assistance files showed were not counted. (Petition at 6.)

6, 7-9), as is the seriousness of the constitutional injury flowing from an inaccurate Census (Petition at 14-17). Thus, this case provides the constitutional and statutory context within which the discovery questions before this Court in *Shapiro* and *McNichols* should properly be analyzed. To decide whether documents that are central to the proof of Census error are privileged from disclosure without having first resolved issues concerning the underlying constitutional rights involved is to put the cart before the horse. Determination of the discovery question out of its constitutional and statutory context could undermine fundamental constitutional rights without consideration of a record fully presenting the nature of those rights.

5. As is more fully set forth in the attached Petition for Certiorari (Petition at 11-12, 17-24), the opinion of the Second Circuit in this case, in practical effect, precludes judicial consideration of challenges to Census accuracy.* If the Second Circuit's decision is permitted to stand, then the discoverability of Census documents in cases such as *McNichols* will be of no practical consequence and effectively moot.

6. As is more fully explained in the attached Petition for Certiorari (Petition at 24-25), this case involves both the address lists at issue in *Shapiro* and the vacancy lists at issue in *McNichols,* and—unlike those cases—presents both questions against a fully-developed record which includes, *inter alia,* admissions of top Census officials confirming the relevance of these documents to an assessment of Census accuracy; proof that some of those documents have been selectively released by the Bureau; overwhelming evidence and a judicial finding of a disproportionate undercount in New York; and the fullest development available of the legal issues underlying the Census cases.

7. Because *Shapiro* and *McNichols* were only recently consolidated for oral argument and because final briefs in

---

* Although the Second Circuit remanded the case to the district court, purportedly for further proceedings consistent with its opinion, the district judge stated at a status conference on September 24, 1981, that retrial was "impossible" under the conditions imposed by the court of appeals (Tr. at 3), and both parties agreed. (*Id.* at 4, 8.)

McNichols have not yet been filed, any delay that might result from consolidating this case with them will be slight. Moreover, even that delay can be substantially decreased by an order advancing the filing dates for respondents' brief and for the briefs on the merits of this action.

8. Expediting the Court's consideration of this case will also serve the interests of voters aggrieved by Census undercounting. Because of statutory reporting deadlines and because of the speed with which reported Census figures are relied upon for redistricting and other purposes, delay makes any final remedy adjusting Census figures increasingly disruptive. As redistricting lines are drawn, representatives elected and funds distributed, interests in an erroneous count will become entrenched. As the Government pointed out in its Petition for Rehearing in the Second Circuit, further delays in the resolution of this case could well have "an adverse impact on the distribution of congressional seats for the 1982 election" and "leave a continuing question as to the legitimacy of the Congress elected in 1982".

9. Finally, the questions presented in the attached petition are central to the more than 50 other Census actions pending in lower courts. An accelerated briefing schedule permitting early resolution of these issues will conserve significant judicial energies throughout the 12 circuits.

WHEREFORE, as set forth in the attached Proposed Order, petitioners respectfully request that this Court accelerate the Respondents' Brief in Opposition to their Petition for Certiorari and, if *certiorari* is granted, accelerate the filing deadlines for the remaining briefs in this action and consolidate this case for purposes of oral argument with the *Shapiro* and *McNichols* cases.

October 19, 1981

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.
ROBERT S. RIFKIND,
CRAVATH, SWAINE & MOORE
Attorneys for all petitioners except Hugh L. Carey and the State of New York
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

JOHN A. REDMON
DANIEL J. DANSER
DAVID A. BARRETT
ELLEN S. ORAN

ROBERT ABRAMS
Attorney General of The State of New York
Attorney for Hugh L. Carey and The State of New York
Two World Trade Center
New York, N.Y. 10047
(212) 488-7511

PETER BIENSTOCK
DANIEL BERGER

ALLEN G. SCHWARTZ
Corporation Counsel of The City of New York
Attorney for The City of New York and Edward I. Koch
100 Church Street
New York, N.Y. 10007
(212) 566-3300

MARY MCCORRY

Of Counsel

No.

IN THE

Supreme Court of the United States

October Term, 1981

HUGH L. CAREY, *et al.*,

Petitioners,

—against—

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, *et al.*,

Respondents.

PROPOSED ORDER

Upon consideration of the Motions of Petitioners Hugh L. Carey, *et al.*, for consolidation and for advancement of filing deadlines, it is hereby ordered as follows:

1. Respondents herein shall file their brief in response to the petition for *certiorari*, if any, within days after their receipt of the petition.

2. If *certiorari* is granted, petitioners shall file their brief on the merits within days of the order granting the writ, respondents shall file their brief within days after their receipt of petitioners' brief, and petitioners shall file their reply brief no later than one week before the date of oral argument.

3. If *certiorari* is granted, the case of *Carey v. Baldrige* (No.) shall be consolidated for purposes of oral argument with *Baldrige v. Shapiro* (No. 80-1436) and *McNichols v. Baldrige* (No. 80-1781) and minutes shall be permitted for the argument of the three consolidated cases.

BY THE COURT:

.....

Dated:

Appendix

81-752

No.

Office-Supreme Court, U.S.
FILED
OCT 20 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

HUGH L. CAREY, EDWARD I. KOCH, ALAN CHOU, ROSE L. DAWSON, SHMUEL LEFKOWITZ, MICHAEL LOIZOU, EDWIN MARTINEZ, WALTER E. MARX, BRUNILDA PACHECO, LAMUEL STANISLAUS, THE STATE OF NEW YORK, AND THE CITY OF NEW YORK,

Petitioners,

—against—

MALCOLM BALDRIGE, Secretary of Commerce, BRUCE CHAPMAN, Director, Bureau of the Census, WILLIAM F. HILL, Regional Director, New York Region, Bureau of the Census, RICHARD BITZER, Acting Assistant Regional Director, New York Region, Bureau of the Census, ARTHUR G. DUKAKIS, Regional Director, Boston Region, Bureau of the Census, UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, RONALD REAGAN, President of the United States, EDMUND L. HENSHAW, JR. Clerk of the United States House of Representatives,

Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(List of Counsel on inside cover)

October 19, 1981

FREDERICK A. O. SCHWARZ, JR.
ROBERT S. RIFKIND,
CRAVATH, SWAINE & MOORE
Attorneys for all petitioners except Hugh L. Carey and the State of New York
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

JOHN A. REDMON
DANIEL J. DANSER
DAVID A. BARRETT
ELLEN S. ORAN

ROBERT ABRAMS
Attorney General of The State of New York
Attorney for Hugh L. Carey and The State of New York
Two World Trade Center
New York, N.Y. 10047
(212) 488-7511

PETER BIENSTOCK
DANIEL BERGER

ALLEN G. SCHWARTZ
Corporation Counsel of The City of New York
Attorney for The City of New York and Edward I. Koch
100 Church Street
New York, N.Y. 10007
(212) 566-3300

MARY MCCORRY

Of Counsel

CONTENTS OF APPENDICES

Appendix	Description
A	Constitutional and Statutory Provisions Involved
	Decisions and Orders of the District Court
B	The District Court's Order Denying Defendants' Motion to Dismiss and Granting Plaintiffs' Motion for Partial Summary Judgment (October 1, 1980)
C	The District Court's Order Granting Plaintiffs' Motion for a Preliminary Injunction (October 10, 1980)
D	The District Court's Decision After Trial (December 22, 1980)
E	Final Judgment of the District Court (December 30, 1980)
F	The District Court's Discovery Order (September 10, 1980)
G	The District Court's Preclusion Order (October 22, 1980)
	Decisions and Orders of the Court of Appeals
H	Decision of the Court of Appeals Affirming the District Court's Grant of a Preliminary Injunction (December 15, 1980)
I	Decision of the Court of Appeals Reversing the District Court's Judgment and Remanding for Further Proceedings (June 12, 1981)
J	Order of the Court of Appeals Denying the Parties' Motions for Rehearing (September 10, 1981)
	Order of the Supreme Court
K	Order of the United States Supreme Court Staying in Part the Judgment of the District Court (December 30, 1980)

Appendix A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution

Article I, section 2, clause 3 of the Constitution provides in pertinent part:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxes, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

Article II, section 1 of the Constitution provides in pertinent part:

> The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the Same Term, be elected as follows:
>
> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . . .

Amendment XIV, section 2 of the Constitution provides in pertinent part:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

Amendment XV, section 1 of the Constitution provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Statutes

Section 9(a) of the Census Act, 13 U.S.C. § 9(a), provides:

> Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.
>
> No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

Section 23(c) of the Census Act, 13 U.S.C. § 23(c), provides:

> The Secretary may utilize temporary staff, including employees of Federal, State, or local agencies or instrumentalities, and employees of private organizations to assist the Bureau in performing the work authorized by this title, but only if such temporary staff is sworn to observe the limitations imposed by section 9 of this title.

Section 141(a) of the Census Act, 13 U.S.C. § 141(a), provides:

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

Section 181(a) of the Census Act, 13 U.S.C. § 181(a), provides:

> During the intervals between each census of population required under section 141 of this title, the Secretary, to the extent feasible, shall annually produce and publish for each State, county, and local unit of general purpose government which has a population of fifty thousand or more, current data on total population and population characteristics and, to the extent feasible, shall biennially produce and publish for other local units of general purpose government current data on total population. Such data shall be produced and published for each State, county, and other local unit of general purpose government for which data is compiled in the most recent census of population taken under section 141 of this title. Such data may be produced by means of sampling or other methods, which the Secretary determines will produce current, comprehensive, and reliable data.

Section 195 of the Census Act, 13 U.S.C. § 195, provides:

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

Federal Rule

Rule 37, Fed. R. Civ. P., provides in pertinent part:

If a party ... fails to obey an order to provide or permit discovery ... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination...

Appendix B

Hugh L. CAREY, Edward I. Koch, Alan Chou, Rose L. Dawson, Shmuel Lefkowitz, Michael Loizou, Edwin Martinez, Walter E. Marx, Brunilda Pacheco, Lamuel Stanislaus, the State of New York, and the City of New York, Plaintiffs,

v.

Philip M. KLUTZNICK, Secretary of Commerce, Vincent P. Barabba, Director, Bureau of the Census, William F. Hill, Regional Director, New York Region, Bureau of the Census, Richard Bitzer, Acting Assistant Regional Director, New York Region, Bureau of the Census, Arthur G. Dukakis, Regional Director, Boston Region, Bureau of the Census, United States Department of Commerce, Bureau of the Census, Jimmy Carter, President of the United States, and Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, Defendants.

No. 80 Civ. 4550 (HFW)

United States District Court,

S. D. New York.

Oct. 1, 1980.

Cravath, Swaine & Moore, New York City, for all plaintiffs except the State of New York and Hugh L. Carey; Frederick A. O. Schwarz, Jr., David A. Barrett, Roger D. Einerson, Francis P. Barron, Michael J. Malone, Catherine Raymond Flickinger, Calvin R. House, New York City, of counsel.

Robert Abrams, Atty. Gen. of the State of New York, New York City, for the State of New York and the Hon. Hugh L. Carey; Robert Hermann, Peter Bienstock, Shiela Abdus-Salaam, Daniel Berger, Asst. Attys. Gen., New York City, of counsel.

Corporation Counsel of the City of New York, for the City of New York and Edward I. Koch; Allen G. Schwartz, Mary McCorry, New York City, of counsel.

John S. Martin, Jr., U. S. Atty., S. D. N. Y., New York City, for defendants; Michael H. Dolinger, Jane E. Booth, Steven E. Obus, Patrick H. Barth, Asst. U. S. Attys., New York City, of counsel.

OPINION

WERKER, District Judge:

This action was commenced by plaintiffs Hugh L. Carey, Governor of the State of New York, and Edward I. Koch, Mayor of the City of New York, in both their official and individual capacities, several other citizens, voters and taxpayers residing within New York State, and the City and State of New York. Named as defendants are Philip M. Klutznik, Secretary of Commerce, Vincent P. Barabba, Director of the Bureau of the Census, William Hill and Arthur G. Dukakis, Regional Directors of the Census Bureau for the New York and Boston Regions, respectively, Richard Bitzer, Acting Assistant Regional Director of the Census Bureau for the New York Region, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, the United States Department of Commerce, Bureau of the Census, and Jimmy Carter, President of the United States. By commencement of this action, plaintiffs seek to vindicate their right, under the Constitution and laws of the United States, to maintain the efficacy of their votes. See U.S. Const. art. I, § 2, cl. 3; U.S. Const. amends. I, V, XIV, XV; 13 U.S.C. § 1, et seq.; 5 U.S.C. § 551, et seq. They hope to accomplish this by obtaining declaratory and injunctive relief requiring the defendants to adjust census figures in a manner that would compensate for the expected undercount of the population of New York State. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1331, 1337, 1361, 2201, 2202, and 5 U.S.C. § 702.

Plaintiffs have moved for preliminary injunctive relief seeking to enjoin the defendants Klutznick, Barabba, Hill, Bitzer and the Bureau of the Census from closing any District Offices in New York State until plaintiffs have had an adequate opportunity to review preliminary census figures and until defendants have taken a variety of measures[1] to remedy what plaintiffs allege is a severe undercount of the populations of New York City and New York State. Plaintiffs also seek an order requiring the Census Bureau to undertake a statistical adjustment of the populations of the City and State to compensate for the undercount and have moved for partial summary judgment pursuant to Fed.R.Civ.P. Rule 56(a) on the issue of whether the Census Bureau has the authority to utilize statistical adjustments for the purpose of apportioning representatives in Congress. Defendants have moved under Fed.R.Civ.P. Rule 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief may be granted, lack of standing, lack of a justiciable claim under the political question doctrine, and lack of ripeness. Defendants also have moved pursuant to Fed.R.Civ.P. Rule 26(c) for an order staying all discovery pending disposition of their motion to dismiss. This motion already has been disposed of by prior orders of the Court. Defendants also have moved for partial summary judgment under Fed.R.Civ.P. Rule 56(a) on the issue of whether the procedures adopted by the Census Bureau for conducting the 1980 Census were rational and were executed in a rational manner. The Court will now decide only the defendants' motion to dismiss, plaintiffs' motion for partial summary judgment and defendants' motion for partial summary judgment. Hearings on plaintiffs' motion for a preliminary injunction have been deferred until October 6, 1980.

---

1. Plaintiff's motion for preliminary injunctive relief seeks, in part, to enjoin defendants from closing Census Bureau District Offices in New York State until the Bureau has attempted to enumerate persons that were missed in the original count, further attempts have been made to re-enumerate persons whose questionnaires were lost or who were labelled "last resort", and all quality control procedures have been adhered to by the Census Bureau.

BACKGROUND

The United States Constitution provides that "[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed." U.S.Const. amend. 14, § 2. The population figures upon which apportionment is based are derived from the results of the decennial census. *See* U.S.Const. art. 1, § 2, cl. 3. Plaintiffs allege that there has been a serious undercount of the populations of New York State and New York City in the present decennial census and that because of this, New York will lose at least one representative to which it is entitled and also will be denied substantial amounts of federal funds that are allocated on the basis of census population figures. Plaintiffs assert that the undercount is a well known phenomenon that has existed in the past and will occur again in 1980. They claim that the undercount is particularly severe with respect to certain classes of so called "hard to enumerate" persons and certain areas of the country. The "hard to enumerate" groups include Blacks, Hispanics, other racial and ethnic minorities, aliens, non-English speaking individuals, the poor, and those living in high-crime areas. According to plaintiffs, New York State and New York City contain a disproportionate number of the "hard to enumerate" when compared to the nation as a whole. As a consequence, they claim that the undercount for New York will be substantially higher than that for other areas of the country. Plaintiffs suggest that the undercount can be remedied by the use of statistical and demographic techniques currently available to the Census Bureau but that it has refused and will continue to refuse to do so at least for the purpose of apportionment of representatives.[2]

2. This failure to adjust, plaintiffs assert, also will have the effect of causing malapportionment of legislative districts for the election of representatives to the New York State legislature since intrastate apportionment in New York is based upon the results of the decennial census.

DISCUSSION

Standing

Defendants' contend that plaintiffs' lack standing to maintain this action because the harm they raise is merely speculative and because they are unable to demonstrate that the relief they seek will benefit them personally. This Court first notes that when ruling on a motion to dismiss for lack of standing, all material allegations of the complaint must be accepted as true and the complaint construed in favor of the complaining party. *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975). Consequently, the court must accept as true that there will be a disproportionate undercount of the populations of New York City and New York State, resulting in an "undercount for New York [that] will be substantially higher in percentage terms [and in absolute numbers] than it will be for the rest of the United States." Complaint at ¶ 33. It also must accept as true that New York State will be deprived of its full share of representatives in Congress if the undercount is not remedied, complaint at ¶ 39, and that there are feasible means by which the Census Bureau can adjust its count to compensate for the undercount. Complaint at ¶ 35. For purposes of this motion, this court also must assume that the Census Bureau's failure to adopt procedures to remedy the undercount, if established, would be adjudged to violate the constitutional rights of plaintiffs. Complaint at ¶ 55; *see Warth v. Seldin,* 422 U.S. at 502, 95 S.Ct. at 2207.

The concept of standing involves both constitutional and prudential limitations on the exercise of a court's jurisdiction. It requires that a court decide only cases or controversies. As stated by Mr. Justice Powell in *Warth v. Seldin:*

> [a]s an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.... A federal court's jurisdiction . . . can be invoked only when the

> plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . . .'

Warth v. Seldin, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975), quoting *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.E.2d 663 (1962), and *Linda R. S. v. Richard D.,* 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973); *see Alexander v. Yale University,* 631 F.2d 178, (2d Cir. 1980). Thus, the elements comprising standing are (1) concrete harm to the plaintiff (2) caused by the challenged actions of the defendant (3) that can be redressed by the Court. *See Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59, 72-74, 98 S.Ct. 2620, 2630-2631, 57 L.Ed.2d 595 (1978).

While a "generalized grievance" shared by a large number of citizens usually will not justify the exercise of jurisdiction, *see Schlesinger v. Reservists to Stop the War,* 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *United States v. Richardson,* 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974), the mere circumstance that many individuals share the same injury is an insufficient ground for precluding an aggrieved person from seeking review of an agency's action. *United States v. SCRAP,* 412 U.S. 669, 686, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973).

Standing is not derived from the merits of a plaintiff's claim that certain conduct is illegal, but it frequently may depend on "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin,* 422 U.S. at 500, 95 S.Ct. at 2206. In *Baker v. Carr,* for example, plaintiffs sued under 42 U.S.C. §§ 1983 and 1988 alleging that a Tennessee statute apportioning the state legislature violated the equal protection clause because it created severe imbalances in the proportion of voting population to representation. *Baker v. Carr,* 369 U.S. at 207, 82 S.Ct. at 704. The Court held that plaintiffs had standing to bring the suit, stating that plaintiffs had asserted " 'a plain, direct and adequate interest in maintaining the effectiveness of

their votes,' not merely a claim of 'the right, possessed by every citizen, to require that the Government be administered according to law.' " *Id.* at 208, 82 S.Ct. at 705, quoting *Coleman v. Miller,* 307 U.S. 433, 438, 59 S.Ct. 972, 975, 83 L.Ed. 1385 (1939), and *Fairchild v. Hughes,* 258 U.S. 126, 129, 42 S.Ct. 274, 275, 66 L.Ed. 499 (1922). Cases in which voter standing was found to exist that were cited with approval by the *Baker* Court were not limited to challenges to apportionment of state legislatures. Rather, they included challenges by state residents to apportionment of federal congressional districts. *See, e. g., Colegrove v. Green,* 328 U.S. 549, 550, 568, 66 S.Ct. 1198, 1209, 90 L.Ed. 1432 (1946).

Based on a review of the foregoing authorities, it would appear that the claim asserted by the plaintiffs in the case at bar is indeed cognizable by this court. Faced with a similar challenge to the census, however, the Court in *FAIR v. Klutznick,* 486 F.Supp. 564 (D.D.C.1980), found that plaintiffs had failed to establish standing since they had been unable to demonstrate that a concrete harm would occur to one of them and that the relief requested would benefit them personally. The Court stated:

> While the plaintiffs estimate that between one and sixteen congressional seats will be affected depending on its inclusion of illegal aliens, they can do no more than speculate as to which states might gain and which might lose representation. . . . Depending on how many illegal aliens there are, where they live, how accurate the census count is, and the interplay of all the other population factors which affect apportionment, any of a number of states might benefit by the relief requested by the plaintiffs; the only effect which seems inevitable is that California would lose seats, though again, how many is a matter of speculation. Therefore, *none* of the plaintiffs are able to allege that the weight of his or her vote in the next decade *will be affected* by the expected method of taking the census and apportioning congressional seats. . . . Despite diligent search, we have been unable to find a single case

> in which standing was granted to a plaintiff because *some* harm was likely to occur and it *might* affect the litigant personally, and we have been referred to no such case.

Id. at 570 (emphasis in original).

It is suggested that the facts of *FAIR* are distinguishable from those of *Carey,* and that therefore, the *FAIR* Court's analysis is not persuasive in this Court's evaluation of the present controversy. First, the injury alleged in *Carey,* the substantial undercount of the population of New York, is fairly well ascertainable at this point in time. Although it cannot be said with precision what the exact undercount in New York is or to what extent the undercount in New York will be disproportionate to that in other states, it would appear that plaintiffs' allegations amount to more than mere speculation. Preliminary figures and reports concerning the undercount in New York and other states currently are available to the Census Bureau and the plaintiffs. These tabulations provide the basis for estimates of the extent of the undercount in New York and elsewhere. Thus, it appears that the alleged harm to plaintiffs is sufficiently concrete. In addition, as residents and voters of New York State, plaintiffs have demonstrated their personal stake in the outcome of this controversy and that the relief they seek, if ultimately granted by this court, would benefit them personally. Finally, it must be remembered that on a motion to dismiss for lack of standing, the court must accept the allegations of plaintiffs' complaint as true, and need not determine whether plaintiffs' "allegations of impairment . . . will, ultimately, entitle them to relief in order to hold that they have standing to seek it." *Baker v. Carr,* 369 U.S. at 208, 82 S.Ct. at 705.

Political Question

Defendants contend that plaintiffs challenge to the manner in which the census was conducted raises a non-justiciable political question. Our evaluation of this contention must begin with the case of *Baker v. Carr,* in which the Supreme Court set forth clearly the principles underlying the political question

doctrine. The *Baker* Court stated that the issue of whether a suit involves a political question is essentially a "function of the separation of powers" between the judiciary and the coordinate branches of the federal government. Thus, determining if a case involves a political question involves a decision of "whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed" to it. The Court as "ultimate interpreter of the Constitution" bears the responsibility for making this evaluation. *Baker v. Carr,* at 210-11, 82 S.Ct. at 706.

Merely because a litigant seeks the protection of political rights does not necessarily mean that his suit raises a political question. *Id.* at 209, 82 S.Ct. at 705. The Court in *Baker* found that plaintiffs' claim that their votes were being debased in violation of the equal protection clause was justiciable and that if "discrimination [were] sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *Id.* at 209-10, 82 S.Ct. at 706. Of course, it must be observed that *Baker* involved a challenge to the apportionment of the Kentucky legislature, and therefore, presented no conflict between the federal judiciary and Congress, a situation which, under the Court's explanation of the political question doctrine, would be more likely to present a nonjusticiable question. *See id.* at 210, 82 S.Ct. at 706. Nevertheless, the *Baker* Court reviewed the holding of *Colegrove v. Green,* 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946) which involved a challenge to Congressional apportionment. The Court found that "on the issue of justiciability, all four justices comprising a majority relied upon *Smiley v. Holm,*" 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795 (1932), which, with the two other cases of *Koenig v. Flynn,* 285 U.S. 375, 52 S.Ct. 403, 76 L.Ed. 805 (1932) and *Carroll v. Becker,* 285 U.S. 380, 52 S.Ct. 402, 76 L.Ed. 807 (1932), "settled the issue in favor of justiciability of questions of congressional redistricting." *Baker v. Carr,* 369 U.S. at 232, 82 S.Ct. at 718. Two years following its decision in *Baker,* the

Court reaffirmed its view that challenges to Congressional apportionment were justiciable. *Wesberry v. Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964).

While *Carey v. Klutznick* involves a challenge to the census, and not precisely a challenge to congressional redistricting, the former provides the foundation for apportionment and redistricting and, therefore, the precedents sustaining challenges to congressional redistricting should afford a predicate for finding the claims before the court justiciable. Furthermore, there have been several cases in which challenges to census procedures have in fact been entertained by the federal courts. *See, e. g., Borough of Bethel Park v. Stans,* 449 F.2d 575 (3d Cir. 1971); *City of Camden v. Plotkin,* 466 F.Supp. 44 (1978); *Quon v. Stans,* 309 F.Supp. 604 (1970).

The most difficult issue to resolve in the area of nonjusticiability is that the language of Art. 1, § 2, cl. 3 provides that the census is to be taken in such manner as Congress shall by law direct. This would appear to constitute "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Under the principles elaborated in *Baker v, Carr,* such commitment usually indicates the existence of a political question. It nevertheless appears to the Court that in a case such as this, there exists the overriding consideration that the Framers also intended to extend the authority of the judicial branch should to those controversies which concern the execution of the provisions expressly contained in the articles of Union," *see* A. Hamilton, J. Madison, and J. Jay, *The Federalist,* No. LXXX, p. 494 (Lodge ed. 1888), for "maintaining in practice the necessary partition of power among the several departments [can only be accomplished] by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." *See id.* No. LI, p. 322. In language strongly apropos to our present inquiry, the Court, in *Wesberry v. Sanders,* stated;

> [The] statement in *Baker,* which referred to our past decisions holding congressional apportionment cases to be

> justiciable, we believe was wholly correct and we adhere to it. Mr. Justice Frankfurter's *Colegrove* opinion contended that Art. I, § 4, of the Constitution had given Congress "exclusive authority" to protect the right of citizens to vote for Congressmen, but we made it clear in *Baker* that nothing in the language of that article gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury v. Madison,* 1 Cranch 137, [2 L.Ed. 60] (1803). The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I.

Wesberry v. Sanders, 376 U.S. at 6—7, 84 S.Ct. at 529. (citations omitted). Thus, it appears that both precedent and the intent of the Framers warrant the conclusion that the issues presented in *Cary v. Klutznick* are justiciable.

RIPENESS

Defendants have also sought dismissal of plaintiffs' action on the ground that the claims they assert are not ripe for judicial review. In the context of challenges to the decisions of administrative bodies, the underlying rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." The concept requires a determination as to the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148—49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). *Abbott* involved a challenge by drug manufacturers to regulations promulgated by the Commissioner of Food and Drugs ex-

ercising authority delegated to him by the Secretary of HEW to enforce certain congressional legislation. On the first issue, that of fitness of the issues for judicial resolution, the Court found that (1) the question presented for decision was the purely legal one of whether the statute at issue was properly interpreted by the Commissioner and that (2) when *expected* conformity with agency regulations will cause injury, the agency's action is subject to judicial review. A party is not required to wait until an agency regulation is actually put into effect in order to assert that he is injured by it. *Id.* at 149—50, 87 S.Ct. at 1515—16. On the issue of hardship to the parties, the Court found that "the impact of the regulations . . . [was] sufficiently direct and immediate as to render the issue appropriate for judicial review." *Id.* at 152, 87 S.Ct. at 1517.

The similarity of *Abbott* to *Carey v. Klutznick* is striking. First, the underlying question presented for review in this case is the legal one of whether the Commissioner of the Census Bureau has correctly interpreted the applicable constitutional and statutory provisions concerning whether statistical adjustments may be used in apportioning representatives for Congress. Second, expected conformity with the Census Bureau's interpretation that adjustments may not be utilized for this purpose clearly will cause injury to these plaintiffs in the form of dilution of their votes. The only aspect in which *Carey* and *Abbott* differ is that the ruling at issue in *Abbott* was promulgated in the form of a regulation in the CFR. There is no evidence in *Carey* that the Commissioner's position was reported so formally. It would appear, however, that if his opinion was stated as the final official position of the Bureau on the matter, it may be deemed final. Since the Department of Justice has argued before this Court on behalf of the Census Bureau that it is not required to adopt such procedures it would indeed appear that this is the final and official position of the Census Bureau. As was noted by the *Abbott* Court, "[t]he cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic and [flexible] way." *Id.* at 149-50, 87 S.Ct. at 1516.

As further observed by the Court in *Duke Power Co. v. Carolina Environmental Study Group,* the issue of ripeness is an aspect of the case or controversy requirement. A conclusion that the plaintiffs will suffer immediate injury as a result of the defendant's conduct and that the injury would be redressed by the relief sought will suffice to satisfy that requirement. *See Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. at 81, 98 S.Ct. at 2634. The prudential aspect of the ripeness doctrine, involves the timing of the plaintiff's request for relief. Where "delayed resolution of [the] issues would foreclose any relief from the present injury suffered by [plaintiff]" and review would also be beneficial to the defendant, there is no reason to defer consideration of the issues presented. Certainly, this language applies to *Carey* in that if judicial resolution of the issue of whether statistical adjustment may be utilized in the apportionment process is delayed, plaintiffs will be precluded from relief because final figures for this purpose must be submitted by the Census Bureau to the President by Dec. 31, 1980. *See generally Central Hudson Gas & Electric Co. v. Environmental Protection Agency,* 587 F.2d 549, 560 (2d Cir. 1978). For the foregoing reasons, this court concludes that the issues presented by plaintiffs are ripe for judicial review.

Failure to State a Claim for Relief

Defendants contend that plaintiffs' allegations of the Census Bureau's mismanagement of the 1980 Census contained in count I of the complaint fail to state a claim upon which relief may be granted. They assert that under sections 702 and 701(a) of the Administrative Procedure Act, 5 U.S.C. §§ 702, 701(a), plaintiffs have no right to challenge the day-to-day management of the census because Congress has vested the Census Bureau with nonreviewable discretion to design and manage the procedures utilized in the decennial Census. In assessing defendants' contentions, the Court first notes that on a motion to dismiss for failure to state a claim upon which relief may be granted, it must accept the allegations of the complaint

as true and should not dismiss the complaint unless it appears to a legal certainty that plaintiffs cannot establish any facts entitling them to relief. *See Geisler v. Petrocelli,* 616 F.2d 636, 639 (2d Cir. 1980).

Viewed in this perspective, the Court finds that while plaintiffs have challenged the procedures utilized by the Census Bureau, they have not sought to obtain a ruling that one or more of the particular procedures was invalid. Rather, plaintiffs merely were attempting to demonstrate that the overall effect of the Census Bureau's methods was to create an undercount of the populations of New York State and New York City that is so severe as to cast grave doubt on the constitutionality of any congressional apportionment that ultimately is based on the census count. Indeed, plaintiffs in their demand for relief have not requested that this court invalidate any particular methods adopted by the Census Bureau for enumerating the population. It therefore appears that although the Constitution delegates to Congress the authority to determine the manner in which the Census is to be taken, U.S.Const. art. I, § 2, cl. 3, and that Congress in turn has delegated the responsibility for taking the Census to the Bureau of the Census under the direction of the Secretary of Commerce, 13 U.S.C. §§ 2, 141, judicial review is not precluded in this case. In a case analogous to that at Bar, the Court of Appeals for the D.C. Circuit recently observed that:

> "construction of [a] finality provision that foreclose[s] inquiry into the constitutionality of . . . challenged legislation would raise serious question as to the constitutionality of the finality provision itself . . . . [I]f legislation by Congress purporting to prevent judicial review of the constitutionality of its own actions is itself constitutionally suspect, legislation that frees an administrative agency from judicial scrutiny of its adherence to the dictates of the Constitution must pose grave constitutional questions as well. Not only is it daring to suggest that Congress, though subject to the checks and balances of the Constitution, may create a subordinate body free from

> those constraints; it also beggars the imagination to suggest that judicial review might be less crucial to assuring the integrity of administrative action than it is to make certain that Congress will operate within its proper sphere. If the courts are disabled from requiring administrative officials to act constitutionally, it is difficult to see who would perform that function. We say that a statute purporting to foreclose judicial redress of constitutional violations allegedly perpetrated by an administrative agency must be construed in accordance with the standards articulated in *Johnson v. Robison.*

Ralpho v. Bell, 569 F.2d 607, 620 (D.C.Cir. 1977), citing, *Johnson v. Robison*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974).

Hence, a court must determine "whether Congress intended an interpretation of such dubious validity." *Ralpho v. Bell*, 569 F.2d at 620. In this case, it cannot be said that Congress intended such a result. There is no evidence that Congress, by delegating the responsibility for taking the census to the Secretary of Commerce and Bureau of the Census, intended to vest in them nonreviewable authority on an issue posing grave constitutional questions. Consequently, this Court does not believe that it is precluded from reviewing an agency determination that affects a vital aspect of an individual's constitutionally guaranteed rights. Furthermore, as noted in our discussion of the political question issue, the numerous cases in which challenges to particular methods utilized by the Census Bureau have been entertained by the federal courts belie defendants' contention that such review is precluded. *See, e. g., Borough of Bethel Park v. Stans*, 449 F.2d at 577; *City of Camden v. Plotkin*, 466 F.Supp. at 52; *Quon v. Stans*, 309 F.Supp. at 605.

Statistical Adjustment

Defendants also have moved to dismiss the complaint on the ground that plaintiffs' claim for an adjustment of the census figures for New York fails to state a claim upon which relief

may be granted. Plaintiffs, on the other hand, have moved for partial summary judgment on the issue of whether the Census Bureau has the authority to utilize statistical adjustments to improve the accuracy of census figures for New York. These conflicting claims will be analyzed together.

Plaintiffs contend that the Census Bureau does have the authority to make statistical adjustments for the purpose of apportionment for the following reasons. First, they argue that the phrase "the whole number of persons in each state" requires that defendants ascertain "as nearly as is practicable" the actual population of each state. Second, plaintiffs allege that the Census Bureau in 1970 utilized statistical adjustments for the purpose of apportionment. Third, they assert that Congress in the past has granted adjustments to states in which there had been an undercount. Defendants, on the other hand, assert that under the Constitution, they are empowered only to take a headcount of the population. They also assert that they are precluded from employing statistical adjustments by section 195 of the Census Act.

Our evaluation of these contentions must begin with an inquiry into what the Framers of the Constitution meant by the term "whole number of persons in each state." At the Constitutional Convention of 1787, there was substantial disagreement as to whether representation would most appropriately be based on the population or wealth of each state, or rather should be apportioned equally. *See* A. Hamilton, J. Madison, and J. Jay, *The Federalist,* No. LIV pp. 339-44 (Lodge ed. 1888). The resolution of the disagreement was embodied in the so-called Great Compromise under which the states were to have equal representation in the Senate while representation in the House of Representatives was to be based on the population of each state. In order to insure that the distribution of representatives among the states would accurately reflect shifts in population, the Framers provided for periodic reapportionment based on the decennial census. *Id.* No. LVIII p. 362. According to the Framers, the purpose of the requirement that there be a decennial census is to "readjust,

from time to time, the apportionment of representatives to the number of inhabitants, under the single exception that each state shall have one representative at least. . . ." *Id.*

It appears to the Court that this language indicates an intent that apportionment be based on a census that most accurately reflects the true population of each state. We cannot accept the defendants' position that the phrase "actual enumeration" used in Art. 1, § 2, cl. 3, requires otherwise. Indeed, Webster's defines "actual" as "existing in fact or reality" and defines "enumeration" as a "listing" or "counting." Webster's Third New International Dictionary (1971). When combined, these terms require a count of the population most reflective of the true facts or reality, and thereby supports the conclusion that apportionment is to be based on census tabulations that most accurately reflect the population of each state.

The Supreme Court's decision in *Wesberry v. Sanders,* further supports this view. In *Wesberry,* the Court found that:

> The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent "people" they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants. The Constitution embodied Edmond Randolph's proposal for a periodic census to ensure "fair representation of the people" an idea endorsed by Mason as assuring that "numbers of inhabitants" should always be the measure of representation in the House of Representatives. . . .
>
> It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a representative than others.

Wesberry v. Sanders, 376 U.S. at 13-14, 84 S.Ct. at 533. As was noted by Judge Guy in *Young v. Klutznick,* 497 F.Supp. 1318

(E.D.Mich.1980), is but a short step from the reasoning employed in *Wesberry* to the conclusion that census figures must accurately reflect the populations of each state in order to preserve the efficacy of an individual's vote.

Defendants also contend that the Census Act precludes the utilization of statistical adjustment for the purpose of apportioning representatives. More specifically, they argue that 13 U.S.C. § 195 prohibits the use of adjustments for this purpose. That section provides that "sampling" may be used in carrying out the provisions of title 13 "except for the determination of population for purposes of apportionment of Representatives in Congress." 13 U.S.C. § 195. At first glance, defendants position appears correct. However, section 141(a) of the Census Act also must be considered. That section provides that the Secretary of Commerce shall . . . take a decennial census of the population . . . in such form and content as he may determine, including the use of sampling procedures and special surveys. In the face of these apparently conflicting directives, the Court must adopt an interpretation that nullifies neither provision and gives effect and meaning to both. In order to do this, the Court must conclude that the sole use of sampling procedures has been authorized only for purposes other than tabulating census figures for the purpose of apportionment and that in the area of apportionment where important constitutional rights are at stake, the Census Bureau may utilize sampling procedures but only in additon to more traditional methods of enumeration. *See Young v Klutznick, 497 F.Supp. 1318 (E.D.Mich. 1980). Consequently, the Court finds that defendants constitutional and statutory objections concerning the impropriety of emplying statistical adjustments to compensate for the undercount without merit.*

Defendants' Motion for Partial Summary Judgment

Defendants have moved for partial summary judgment dismissing Count I of the Complaint. They contend that the Census Bureau's conduct is not subject to judicial review or that

if review is permissible, it is limited to the question of the rationality of the Bureau's actions. The Court has already determined that the conduct of the Census Bureau is not immune from judicial review. Assuming without deciding that defendants are correct in asserting that the scope of any review the Court may undertake would be limited to whether there was a "rational basis" for the Census Bureau's conduct, the Court finds that there are substantial factual questions concerning the rationality of the Bureau's actions which remain to be adjudicated. Consequently, defendants' motion for partial summary judgment is denied.

Conclusion

In accordance with the above, defendants' motion to dismiss the complaint is hereby denied[3] and plaintiffs' motion for partial summary judgment is hereby granted. Defendants' motion for partial summary judgment is denied.

SO ORDERED.

---

3. The Court, after considering defendants' contentions that Counts III and IV of the Complaint fail to state a claim upon which relief may be granted, finds that it need not dismiss those counts at this time.

Appendix C

Hugh L. CAREY, Edward I. Koch, Alan Chou, Rose L. Dawson, Shmuel Lefkowitz, Michael Loizou, Edwin Martinez, Walter E. Marx, Brunilda Pacheco, Lamuel Stanislaus, The State of New York, and The City of New York, Plaintiffs,

v.

Philip M. KLUTZNICK, Secretary of Commerce, Vincent P. Barabba, Director, Bureau of the Census, William F. Hill, Regional Director, New York Region, Bureau of the Census, Richard Bitzer, Acting Assistant Regional Director, New York Region, Bureau of the Census, Arthur G. Dukakis, Regional Director, Boston Region, Bureau of the Census, United States Department of Commerce, Bureau of the Census, Jimmy Carter, President of the United States, and Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, Defendants.

No. 80 Civ. 4550 (HFW).

United States District Court,
S. D. New York.

Oct. 10, 1980.

Cravath, Swaine & Moore, New York City, for all plaintiffs except the State of New York and Hugh L. Carey; Frederick A. O. Schwarz, Jr., Robert S. Rifkind, David A. Barrett, Roger D. Einerson, Francis P. Barron, Michael J. Malone, Catherine Raymond Flickinger, New York City, of counsel.

Robert Abrams, Atty. Gen. of the State of New York, New York City, for the State of New York and the Hon. Hugh L. Carey; Robert Hermann, Peter Bienstock, Shiela Abdus—Salaam, Daniel Berger, Asst. Attys. Gen., New York City, of counsel.

Corporation Counsel of the City of New York, for the City of New York and the Hon. Edward I. Koch; Allen G. Schwartz, Mary McCorry, New York City, of counsel.

John S. Martin, Jr., U. S. Atty., Southern District of New York, New York City, for defendants; Michael H. Dolinger, Jane E. Booth, Steven E. Obus, Patrick H. Barth, Gaines Gwathmey, III, Asst. U. S. Attys., New York City, of counsel.

OPINION

WERKER, District Judge:

Plaintiffs[1] have commenced this action against the Bureau of the Census[2] to obtain declaratory and injunctive relief from what they allege is a serious undercount of the populations of New York City and New York State. In a previous opinion, this Court determined that plaintiffs had standing to raise the issues presented by this litigation, that their claims were ripe for judicial review, that review of their claims was not barred by the political question doctrine, and that they had stated claims upon which relief could be granted.

Plaintiffs originally moved for preliminary injunctive relief seeking in part to enjoin certain of the defendants from closing any District Offices in the State until plaintiffs were given a sufficient opportunity to review preliminary census figures; defendants attempted to enumerate persons that were missed in the original count; further attempts were made to re-enumerate persons whose questionaires were lost; all quality control proce-

1. Plaintiffs are Hugh L. Carey, Governor of the State of New York, and Edward I. Koch, Mayor of the City of New York, in both their official and individual capacities, several other citizens, voters and taxpayers residing within New York State, and the City and State of New York.

2. Also named as defendants are Philip M. Klutznick, Secretary of Commerce, Vincent P. Barabba, Director of the Bureau of the Census, William Hill and Arthur G. Dukakis, Regional Directors of the Census Bureau for the New York and Boston Regions, respectively, Richard Bitzer, Acting Assistant Regional Director of the Census Bureau for the New York Region, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, and Jimmy Carter, President of the United States.

dures were carried out; certain enumeration procedures were repeated in specified areas; and other measures were undertaken to decrease the possibility that a sizable portion of New York's population was not counted. Because of intervening circumstances including the Census Bureau's decision to close a large number of its District Offices prior to the hearing on this motion, the plaintiffs modified their request for the foregoing preliminary injunctive relief. They now seek only that the Census Bureau be required to accept "Were You Counted" forms not received within the deadline set by the Census Bureau and computer tapes listing the names and addresses of "hundreds of thousands of New Yorkers who fall into" the hard-to-enumerate classification. They further seek that the Bureau be directed to compare these forms and tapes with Census Bureau records in order to ferret out persons heretofore missed in the count and then report to the Court its findings and the steps it will take to include these individuals in the official population tabulation that will be reported to the President. Plaintiffs' rationale for asserting that this relief is necessary is that despite any statistical adjustment that ultimately may be ordered, the actual headcount should be as accurate as possible in order to increase the overall reliability of census population figures. Defendants contend that plaintiffs are not entitled to the relief requested because they have failed to establish the possibility that they will suffer irreparable harm if the injunction is not issued and because they have not shown that they are likely to succeed on the merits.

A hearing on plaintiff's application was held on October 6, 1980. All of the evidence and arguments having been duly considered, the motion is hereby granted. In accordance with Fed.R.Civ.P. 52(a) my findings of fact and conclusions of law for purposes of this preliminary injunction motion are as follows.

Facts

Plaintiffs allege that there has been a substantial undercount of the populations of New York State and New York City

in the 1980 census and that as a consequence, New York will lose at least one representative in Congress and also will be denied significant amounts of federal funds. According to plaintiffs, the undercount is a well-known phenomenon that has existed in the past and will occur again in 1980. They claim that the undercount is particularly severe with respect to persons falling within the hard-to-enumerate category and that New York contains a disproportionate number of these persons. Consequently, they contend that there has been a large undercount of the population of New York and that the undercount in New York is higher than that in other areas of the nation. Defendants do not dispute plaintiffs contentions except in so far as they relate to the magnitude of the undercount in New York and as it compares to the nation as a whole.

In support of their allegations that the undercount in New York is more severe than in other parts of the country, plaintiffs have submitted the results of a random phone survey of New York City and New York State residents between August 20, 1980 and September 11, 1980, conducted by the independent public affairs research organization, Penn & Schoen. The survey was structured to determine whether the household called had received a 1980 census form, whether it had completed and returned it and if not, whether a census enumerator had visited the household for the purpose of enumeration. Affid. of Douglas Schoen, sworn to Oct. 1, 1980, ¶ 2. The results of the survey indicate that 6% of the population of New York State and 8% of the population of New York City have not been counted by the Census Bureau.[3] Schoen affid. at

3. According to plaintiffs' affiant, at the statewide level, 5% of all whites, 9% of all hispanics and 10% of all blacks were not counted by the Census Bureau. In New York City, 6% of all whites and 10% each of the hispanic and black populations were not counted by the Bureau. Schoen affid. at ¶4. Follow-up interviews were effective in counting persons primarily with regard to only those persons who received a census form in the first instance. Thus, of households that received a form and did not return it, 72% were visited by a census enumerator while households that never received a form were visited at a rate of only 32%. Schoen affid. at ¶7. Any possible sources of bias in the

¶ 4. The Census Bureau, on the other hand, has asserted that the undercount for the nation will be approximately 3,000,000 of a total population of approximately 224,000,000. This estimate of the number of those who will go uncounted is only 1.3% of the total population. *See* Statement of Vincent P. Barabba, Director of the Census Bureau, concerning the City of Detroit's 1980 Census Suit, Oct. 3, 1980. Clearly, the undercount estimated by the Penn & Schoen survey for New York is significantly larger than that estimated by the Census Bureau for the rest of the nation.

Plaintiffs have also submitted substantial evidence supporting their claims of the Census Bureau's mismanagement of the 1980 census. From their affidavits and depositions, it is clear that there has been a serious lack of communication between and among the various levels of Census Bureau management. Also evident is that conflicting directives have been issued to different District Offices concerning the number of challenges to census figures that could remain unverified at the time an office closed. *See, e. g.,* Dep. of Ethel Brown at pp. 185-86; Dep. of Hubert Calderon at pp. 9-12. Consequently, it appears that some offices were closed when there was still a relatively large number of unverified challenges while other offices were not closed until most or all challenges were verified. There is also evidence that there was insufficient manpower in many offices.

Discussion

The standard in the Second Circuit for the issuance of a preliminary injunction has been "possible irreparable harm and either (1) probable success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping

---

survey, according to plainriffs' affiant, would tend to underestimate the magnitude of any census undercount of the New York State population for reasons including the fact that many New Yorkers do not have phones and those without phones would be more likely to have been missed by the Census Bureau. Schoen affid. at ¶¶14-15. The results of the survey concerning black and hispanic households are accurate, at the ninety-five percent confidence level to within two percent . . . ." Schoen affid. at ¶13.

decidedly in the movant's favor." *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206-07 (2d Cir. 1979). Defendants contend that the Second Circuit's recent decision in *Union Carbide Agricultural Products Co. v. Costle*, 632 F.2d 1014 (2d Cir. 1980), has altered this test when the party sought to be enjoined is a governmental agency. They contend that under this decision plaintiffs are now required to show irreparable harm and likelihood of success on the merits and cannot carry their burden by relying on the less stringent test of irreparable harm and fair grounds for litigation and a balance of hardships tipping decidedly in their favor.[4] It is not clear to this Court that *Union Carbide* is controlling in this case for the reason that *Carey* unlike *Union Carbide* does not involve challenges to actions specifically mandated by statute. Rather, *Carey* involves challenges to actions and procedures developed for the 1980 census by the Census Bureau. Nevertheless, even if it is assumed that the plaintiffs must meet a more stringent burden imposed by *Union Carbide*, the Court finds for the following reasons that plaintiffs have demonstrated both irreparable harm and a substantial likelihood of success on the merits.

Irreparable Harm

Defendants contend that plaintiffs allegations of Census Bureau mismanagement of the 1980 census are insufficient to establish the possibility that they will suffer irreparable harm. The Court disagrees with defendants for the following reasons. First, by their affidavits and depositions plaintiffs have raised important questions concerning the accuracy of the census count in New York due to Census Bureau mismanagement.

4. In *Union Carbide*, the plaintiffs sought a preliminary injunction restraining the Environmental Protection Agency from enforcing certain disclosure and use provisions of the Federal Pesticide Act on the ground that they constituted a taking of their property without just compensation or due process of law. The Second Circuit held that "[w]hen Congress authorizes or mandates governmental action that is in the public interest, more than a 'fair ground for litigation' must be shown before the action will be stopped in its tracks by court order." *Union Carbide Agricultural Products Co. v. Costle*, 632 F.2d at 1018.

Since the Bureau has consistently maintained that an adjustment of census figures is not feasible, *see* Statement of Vincent P. Barabba, Director of the Census Bureau, Concerning the City of Detroit's 1980 Census Suit, Oct. 3, 1980, it would seem that plaintiffs right to maintain the efficacy of their votes will be irreparably harmed if the Census Bureau is not required to consider the "Were You Counted Forms" and computer lists proffered by plaintiffs. Second, defendants focus on plaintiffs' allegations of Census Bureau mismanagement overlook the serious constitutional issues raised by the plaintiffs. This Court has already observed that plaintiffs' fundamental right to vote may not be undermined by apportionment based on a census count that is so inaccurate that it results in the dilution of their votes. The possibility of irreparable harm posed by these factors is clear and consequently plaintiffs have met their burden on this aspect of the Second Circuit's test.

Likelihood of Success on the Merits

Defendants contend that plaintiffs have failed to demonstrate that they are likely to succeed on the merits of the mismanagement claims. As previously noted, plaintiffs have submitted significant evidence concerning Census Bureau mismanagement of the decennial census. It appears to the Court that they have raised serious questions as to whether some of the policies or procedures employed by the Census Bureau were carried out in an irrational or arbitrary manner. I find that plaintiffs also have demonstrated clearly that they are likely to succeed on the merits of their claims that a disproportionate undercount of the population that dilutes the efficacy of their votes violates their fundamental right to vote under the United States Constitution. First, plaintiffs have submitted substantial evidence of the magnitude of the undercount in New York. Second, in my previous opinion in this case, I found that plaintiffs' allegations of impairment of the efficacy of their votes had stated a claim upon which relief could be granted. Implicit in these findings is that plaintiffs have also established that the

issues raised by them present fair grounds for litigation and that the balance of hardships tips decidedly in their favor.

Conclusion

For the foregoing reasons, plaintiffs motion for a preliminary injunction is hereby granted.

SO ORDERED.

Appendix D

Hugh L. CAREY, Edward I. Koch, Alan Chou, Rose L. Dawson, Shmuel Lefkowitz, Michael Loizou, Edwin Martinez, Walter E. Marx, Brunilda Pacheco, Lamuel Stanislaus, The State of New York, and The City of New York, Plaintiffs,

v.

Philip M. KLUTZNICK, Secretary of Commerce, Vincent P. Barabba, Director, Bureau of the Census, William F. Hill, Regional Director, New York Region, Bureau of the Census, Richard Bitzer, Acting Assistant Regional Director, New York Region, Bureau of the Census, Arthur G. Dukakis, Regional Director, Boston Region, Bureau of the Census, United States Department of Commerce, Bureau of the Census, Jimmy Carter, President of the United States, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, Defendants.

No. 80 Civ. 4550 (HFW).

United States District Court,
S. D. New York.

Dec. 22, 1980.

Cravath, Swaine & Moore, New York City, for all plaintiffs except the State of New York and Hugh L. Carey; Frederick A. O. Schwarz, Jr., Robert S. Rifkind, David A. Barrett, Roger D. Einerson, John A. Redmon, Michael J. Malone, Roger H. Cummings, Mark P. Schnapp, Ronald P. Mysliwiec, New York City, of counsel.

Robert Abrams, Atty. Gen. of the State of New York, New York City, Peter Bienstock, Shiela Abdus-Salaam, Daniel Berger, Asst. Attys. Gen., New York City, of counsel, for the State of New York and the Hon. Hugh L. Carey.

Allen G. Schwartz, Corp. Counsel of the City of New York, New York City, Mary McCorry, New York, City, of

counsel, for the City of New York and the Hon. Edward I. Koch.

John S. Martin, Jr., U. S. Atty., S. D. New York, New York City, Michael H. Dolinger, Jane E. Booth, Steven E. Obus, Thomas D. Warren, Gaines Gwathmey, III, Susan M. Campbell, Asst. U. S. Attys., New York City, of counsel, for defendants.

OPINION

WERKER, District Judge.

Plaintiffs[1] commenced this suit against several defendants including the Bureau of the Census[2] to obtain declaratory and permanent injunctive relief requiring the defendants to adjust census figures for New York City and New York State in a manner that would reflect more accurately their true populations. Plaintiffs seek this relief on the ground that Census Bureau mismanagement of the census in New York further exacerbated what normally is a substantial undercount of the New York population. This action having been tried on the merits before the Court on November 12-14 and 17-21, 1980, and all the evidence having been duly considered, judgment is rendered for plaintiffs. Pursuant to Fed.R.Civ.P. 52(a), my findings of fact and conclusions of law follow.

---

1. Plaintiffs are Hugh L. Carey, Governor of the State of New York, and Edward I. Koch, Mayor of the City of New York, in both their official and individual capacities, several other citizens, voters and taxpayers residing within New York State, and the City and State of New York.

2. Also named as defendants are Philip M. Klutznick, Secretary of Commerce, Vincent P. Barabba, Director of the Bureau of the Census, William Hill and Arthur G. Dukakis, Regional Directors of the Census Bureau for the New York and Boston Regions, respectively, Richard Bitzer, Acting Assistant Regional Director of the Census Bureau for the New York Region, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, and Jimmy Carter, President of the United States.

FINDINGS OF FACT

THE METHODOLOGY OF THE 1980 CENSUS

The budget for the 1980 decennial census was approximately $1,008,000,000, for the full ten-year period preceding the census and approximately $670,000,000 for 1980. Tr. at 1116. The methodology of the 1980 census is set forth in numerous Census Bureau manuals. *See* Defendant's Ex. 22. Briefly, the census was to be carried out by a mail-out, mail-back procedure. Respondents were to provide the Census Bureau with information concerning the number of persons within their household. Several follow-up procedures designed to detect persons and households who were missed in the original count either because a form was never sent to them or because they failed to return a form also were planned. Finally, there were to be certain last resort techniques and other imputations made by the Census Bureau to complete the count. In order to accomplish the proposed procedures, approximately 270,000 persons were temporarily employed by the Bureau across the nation to supplement the staff of several thousand permanent Bureau employees. Tr. at 1115.

In large cities, mailing lists were compiled from address lists purchased from commercial mailing firms. In outlying areas the Bureau utilized a pre-list procedure whereby enumerators went out to the field and listed every housing unit in a given area. Tr. at 1128-29. It was anticipated that the commercial mailing lists would be incomplete so the Bureau designed procedures to improve the quality of the lists. There were to be three Post Office checks and a precanvass check by enumerators. *Id.* at 1129. "After the [Advance] Post Office check, all of the postal corrections were [to be added] to the list, and the list was then [to be] geocoded . . . ."[3] *Id.* at 1131.

3. The process of geocoding involves entering a code indicating the city block, enumeration district, census tract, place, and other data of a similar nature for every address. In geocoding, "there is a computer program, and a data base known as the geographic base file, or GBF, and the addresses are compared in the computer to the GBF file."

Based on the address lists so compiled, questionnaires were to be mailed out to every listed household in late March 1980. *Id.* at 1137. Every questionnaire that was returned to the local district office was to be matched to the Master Address Register ("MAR"). Deficiencies identified in the MAR's with respect to number of units reported in the structure were to be assigned for recanvass as were questionnaires that appeared incorrect because of the manner in which certain questions were answered. The recanvass operation undertaken at this stage was known as Follow-up I. Essentially, Follow-up I was to consist of series of procedures for field follow-up by enumerators to provide for enumeration of those households that did not receive or return a census questionnaire in the mail and for recanvass of those units which had "failed edit."[4] *Id.* at 1140.

Follow-up I was to commence in mid-April 1980. Questionnaires were to be filled out for any units successfully enumerated in the course of these procedures and the information obtained was to be included in the MAR's. If after four attempts, an enumerator was unable to obtain information concerning a unit, the enumerator was to attempt to obtain that information from persons with knowledge of the status of the unit such as neighbors or janitors. This was known as last resort information. If this procedure still resulted in a dearth of information concerning the unit, the crew leader of the district office was to attempt to enumerate the unit. If this effort similarly proved unproductive, the unit was to be classified as a verified refusal and no further attempt was to be made to enumerate the unit. *Id.* at 1142-43. At the end of Follow-up I there was to be a merge of the MAR's and the Follow-up Address Registers ("FAR's") which were kept in the district offices after which the information in each book was to be identical. There were target dates for the completion of Follow-up I but they were not deadlines and the procedure was

4. An edit failure occurred "[a]ny time the number of units reported by a respondent in a structure was greater than the number of units on the address register for that address." Structures that failed edit were assigned for recanvass. Tr. at 1139.

to continue in each district office until "every housing unit had been enumerated or had been classified as vacant, found to be no longer existent . . . or where . . . visits had been made and no information had been obtained, a so-called unclassified unit." *Id.* at 1146.

At the end of Follow-up I, preliminary figures as to number of units, vacant units and population were to be disclosed to local governmental units for a voluntary procedure known as "local review." The purpose of the program was to permit local officials to compare census figures with their own population and housing figures in order to identify possible problem areas and present challenges to Census Bureau numbers. So long as the local census office was still open and was in a position to investigate the challenges, it was to review the challenges and recanvass the challenged areas if necessary. *Id.* at 1147-51.

The next step in the census operation was known as Follow-up II. This phase of the enumeration involved a recheck of unclassified units, units classified as vacant or nonexistent, and units that had "failed edit." *Id.* at 1152-54. A non-household source check was to be conducted in large cities to improve coverage of minority populations. *Id.* at 1252. In this procedure names and addresses from Motor Vehicle driver's license lists and of legal aliens from the Immigration and Naturalization Service were to be compared against census data received during Follow-up I. In New York City, names and addresses from public assistance files were also to be used in the non-household source check. *Id.* at 1154-56. Follow-up II "was supposed to end when the procedures were all completed. However, the census activities were running behind schedule around the country so that a firm time schedule was developed for each district office, depending on the status of the census in that particular office . . . ." The closing dates were not adhered to in many cases. "[D]istrict offices were told that in order to reach this closing date, that they could truncate some activities, but they were specifically told they could not truncate any activity which had to do with coverage and, therefore, if some

activity was still going on that had not been or could not be completed by that time, the office was kept open until such time as it could be completed, unless it was of a relatively small nature, and if so, the regional census office was asked to complete the activity." *Id.* at 1157.

If at any time after April 1, 1980, unlisted housing units were discovered during the course of any field follow-up operations, the procedures called for those units to be added to the MAR's and enumerated. Tr. 217-18; D's exhibit 22.

At the end of field operations, all of the questionnaires and address registers were to be sent for processing to Jeffersonville, Indiana. At this point, the final population totals were to be tabulated from the questionnaires, and population and other characteristics of any units that remained unclassified were to be imputed based upon the characteristics of the immediately preceding unit. Tr. 1163-64.

PROBLEMS IN EXECUTION

Despite the rather detailed procedures outlined above, the district offices often experienced problems in enumerating the population. The problems were of several different types. Some recurred frequently, thus enabling the court to draw the inference that these or similar problems were encountered throughout New York City and other large cities within the state as well as in some less populous areas of the state.

The first identifiable problem concerns the manner in which the MAR's were compiled for parts of New York City. As discussed above, the MAR's for urban areas were compiled from commercial mailing lists. Use of commercial mailing lists presented several sources of error. First, the commercial lists were incomplete and contained inaccuracies. Plaintiff's Ex. 334 at 134. This rendered "[t]he overall coverage provided by the purchased lists for the Nation's four largest urban areas" including New York at only about 59 percent. *Id.* at 136. The commercial lists frequently lacked apartment unit designations.

This absence posed a serious problem in urban areas because "[t]he 1970 census data showed that approximately 50 percent of the people in central cities of major urban areas live in multiunit structures." *Id.*

The Post Office review procedure was insufficient to correct many of the defects in the address lists. "Bureau experience has shown that the quality of Postal Service reviews is related to the quality of the address list provided.... [T] Postal Service can be expected to improve a list by only about 25 percent." *Id.* The other procedure designed to improve the MAR's compiled from commercial lists, the precanvass by enumerators was the only quality control check for the Postal Service review. Tr. at 1197. This was also of limited effectiveness for several reasons. First, "[t]ime to accomplish the precanvass [was] very limited because" its commencement was delayed. Instead of commencing in the third week of January 1980, precanvass began on February 21, 1980. Plaintiff's Ex. 334 at 139. Other problems experienced in this procedure included delay in receipt of address registers, grossly deficient address registers, illegible, incomplete and inaccurate maps, and lack of trained enumerators due to the reversal of the order of several procedures. Tr. at 915, 265, 268-270, 273. This delay reduced the time available for correcting the MAR's and "some quality controls that could help the precanvass operation, such as the Postal Service's review of precanvass corrections and monitoring, did not take place." Furthermore, "time [was] very limited before census day to react to problems with the precanvass operation." Plaintiff's Ex. 334 at 139-40. Finally, the pre-census local review of address lists was cancelled by the Census Bureau in at least 25,000 local governmental units including the City of Rochester, New York because of delays in completing other preparatory procedures. As a consequence, local help in finding omissions in the address lists prior to the mailing of questionnaires was bypassed. Plaintiff's Ex. 14 at 8; Tr. at 587.

Problems were also experienced with the mail-out, mail-back procedure. Despite several Postal Service efforts to identify additional units that were not on the address listings, the Census Bureau nevertheless failed to update their lists. This required duplicative effort on the part of the Postal Service and when the questionnaires were mailed out at the end of March 1980, the Census Bureau still did not provide forms for 78,000 addresses in the Bronx, Brooklyn, Manhattan and Staten Island. Plaintiff's Ex. 15 at 84—86. The Postal Service continued to deliver forms it received from the census Bureau through mid-April, 1980. *Id.* Instead of placing the forms in the appropriate mailbox, many forms were simply left in apartment building lobbies creating innumerable problems from a failure to return forms at all to returning forms for units other than those for which they were intended. Tr. at 876. *Id.* at 90-92. Problems were also encountered with respect to Spanish language questionnaires. All forms originally delivered by the Census Bureau were in the English language. If a respondent desired a Spanish questionnaire, he was to call a telephone number listed on the front of the English form and a Spanish language form would be mailed to him. In one district office in the Bronx, the local post office returned these Spanish forms because the carriers were under the impression that they were duplicates. *Id.* at 87-89. Finally, no quality control was exercised by the Regional Census Center ("RCC") or national headquarters over Postal Service delivery of the questionnaires. Tr. at 1028.

Another problem encountered with the procedures developed by the Census Bureau was in the area of advertising. The Bureau chose not to utilize paid advertising in the 1980 census and relied instead on public service announcements and free advertising for heightening public awareness to census operations. Tr. at 1055. Despite complaints from the minority community and others that the minority media was less able to provide *pro bono* advertising, the Acting Assistant Regional Director fo the Census for the New York Region, Richard Bitzer, nevertheless failed to consider whether the claims were

accurate. *Id.* at 1056. Furthermore, in addition to limited advertising with respect to the April 1, 1980 mail-out, there was little advertising for subsequent follow-up procedures such as the Harlem recount which took place in the autumn of 1980 and the "Were You Counted Campaign." The lack of publicity for the Harlem recount was attributed to concern that "the Census Bureau is involved in a lawsuit with the City, and if we advertise that we have to get all this work done, that it is not finished, it is going to make us look like we are wrong." Tr. at 82—83, 875.

The overall mail return rate for New York City was 72%. In parts of the city the return rate was considerably lower, decreasing to only 48% in Bedford-Stuyvesant.

Another problem experienced in carrying out the 1980 Census occurred in staffing at both management and enumerator levels. First, it was not a prerequisite that district office managers in the New York Region have prior supervisory experience or prior experience in census-taking in the field. Tr. at 1029. Thus, supervisory staff including some district office managers in decentralized offices[5] and crew leaders lacked experience in supervising large groups. They were not given adequate training by the Census Bureau with respect to the special problems of enumerating the population in New York. Tr. at 639—640. This factor and factors such as severe time and budget pressures imposed by the National and Regional headquarters caused supervisors to be unresponsive to problems made known to them by their staffs. *See* Tr. at 66—67, 106—13, 184, 541, 649—50. Crew leaders and enumerators frequently were unconcerned about the necessity of carrying out procedures in the proper manner, Tr. at 289—290, 482—84, and enumerators were often untrained in certain difficult proce-

5. Centralized offices were those in which the district office manager was a permanent Census Bureau employee. In New York City, seventeen of the twenty district offices were centralized. A centralized district generally is viewed as being more difficult to enumerate than a decentralized district. In decentralized districts, the district office manager was drawn from the local community. Tr. at 1213—14.

dures such as Mission Night.[6] Tr. at 642, 681—82. The final problem and a pervasive one was that of understaffing and high turnover rates in temporary employees. Staffing levels contemplated by the Census Bureau for field operations rarely were achieved. Tr. 270, 555—57, 687, 1011—12; Plaintiff's Ex. 15 at 146—47. High personnel turnover occured at both the enumerator and supervisory level. Plaintiffs Ex. 15 at 116, 129; Plaintiff's Ex. 71.

Another problem previously alluded to is that of Census Bureau deadlines. Whether due to time or budget constraints, there was a definite pattern of pressure on enumerators, crew leaders, and district office managers to finish the job without regard to the quality of the count that would be rendered. *See, e. g.,* Tr. at 304—07, 663, 686—87, 699—700. Closing dates were scheduled by the National headquarters for all district offices apparently without regard for the status of operations in the individual offices. Tr. at 1239—41. District office managers were told that they would be jointly responsible for costs incurred by remaining open beyond the identified closing dates. Plaintiff's Ex. 211. When some district office managers resisted pressure to close because there was still a substantial amount of work to be done, they were overridden by RCC supervisors. *See, e. g.,* Tr. at 336—37. These pressures caused enumerators and crew leaders to falsify work, classify units as vacant, and make up answers on questionnaires. *See, e. g.,* Tr. at 64—66, 80—82, 472—74, 522—23, 530—31.

As a result of time pressure, Spanish questionnaires were not mailed out to those who had requested them, responses in the Spanish language forms were not transcribed to English forms in order to permit them to be processed by Census Bureau computers, damaged forms were not transcribed, and the MAR's and FAR's were not reconciled. Tr. at 202—05,

---

6. Mission Night was a procedure designed to enumerate the populations of temporary residences whose rooms cost no more than $4.00 per night. This would include transient hotels, religious missions and other types of hostels. Tr. at 640.

249—51; Plaintiff' Ex. 260. In addition, there were insufficient bilingual enumerators during followup operations. Tr. at 95—96.

The Census Bureau's decision to pay enumerators at a piece rate rather than an hourly rate was one of the causes of the high turnover rate among enumerators. Plaintiff's Ex. 294; Plaintiff's Ex. 315 at 13—14.

It also appears that quality control procedures failed to identify many of the foregoing problems and that certain procedures were never utilized or were curtailed. *See, e. g.,* Tr. at 651—55. There were several instances in which the Census Bureau was notified that people had not been counted but who were not followed up by the Bureau and were left uncounted. Tr. at 141—56, 174—76.

The effectiveness of the non-household source check in New York City was severely inhibited by the Census Bureau's decision to eliminate 428,210 addresses which represented the addresses of persons under the age of 16 years, a segment of the population that had a high undercount rate in 1970. Tr. at 1208—12.

Finally, the local review procedure was not fully implemented. The Census Bureau did not respond to many local review challanges, Tr. 592—95, and provided insufficient information to allow local governments to identify all missed units. Furthermore, in some districts, Census Bureau review of local challenges was carried out simultaneously with other important operations resulting in insufficient staff for the multiple operations. Tr. at 320.

UNDERCOUNT

The decennial census attempts to count the entire population of the United States. The census, however, is not a headcount in which each and every person residing in the United States on a given date is counted by the Census Bureau. Rather, it is a survey of the population that through the

responses of one member of each household attempts to enumerate the entire population. This method concededly fails to accomplish this, and the resultant underenumeration in the past has been compensated for by imputing population and their characteristics to the results achieved by survey enumeration. *See* Plaintiff's Ex. 29 at 16—18.

As alluded to above, undercounts have been experienced in prior decennial censuses. "[T]he rate of undercounting was 2.7% for the 1960 Census (8.0% Blacks and 2.0% for whites) and 2.5% for the 1970 Census (7.7% for Blacks and 1.9% for whites). Thus, "undercounts were disproportionately large in the 1950, 1960 and 1970 Censuses for certain minority groups compared to the population at large. The Census Bureau has found that disproportionate undercounts existed for Blacks in the 1950, 1960 and 1970 Censuses and for Hispanics in the 1970 Census." Pre-Trial Order, Stipulated Facts Nos. 1—2.

"[M]ost socially and economically disadvantaged minority groups, including Blacks, Hispanics, other minorities and aliens living lawfully in the United States [are] undercounted to a higher degree than the national average . . . because members of such groups have many of the same sociological characteristics that lead to undercounting of Blacks." Plaintiff's Ex. 235 at ¶ 5. These characteristics include:

1. poverty, lack of education and poor language abilities;

2. irregular living arrangements such as several families sharing one living unit; shifting of child-care among several distantly related females; single men with no clearly fixed place of residence; living with a group related by kin or common place of origin; taking in household boarders;

3. a fear that revealing information about family or group members may jeopardize eligibility for government income-transfer programs, may provoke a landlord, may violate health or zoning codes; and

4. general distrust to (sic) all government operations.

Id. at ¶ 6. Illegal aliens are also affected by the foregoing characteristics and in particular fear discovery of their unlawful status by the government. *Id.* at ¶ 10; *see* Tr. at 836—49.

A disproportionate number of the classes of persons that have been more severely undercounted in the past resided in New York City in 1970 as compared to the nation as a whole. Pre-Trial Order, Stipulated Fact No. 3. "[A]ccording to the 1970 census, 11.1 percent of the total population of the United States was Black and 4.6 was of Spanish Origin. In New York City, 21 percent of the population was Black and 15 percent of Spanish Origin. The New York State population was about 12 percent Black and 7 percent Spanish Origin." Plaintiff's Ex. 235 at ¶ 8. The Census Bureau was aware before the 1980 Census that New York City contained "hard to enumerate" areas. Pre-Trial Order, Stipulated Fact No. 9. Furthermore, the Bureau knew that "[d]uring the decade of the seventies, certain demographic changes . . . occurred which would make taking the 1980 census inherently more difficult than taking the 1970 census. In particular, a larger proportion of the population in 1980 will be Black and a larger proportion will fall in the young adult ages, groups which were more difficult to count in 1970." Plaintiff's exhibit 327 at 1. Since New York City and New York State contain disproportionate numbers of the groups mentioned above as well as other groups which are inherently difficult to enumerate, it is reasonable to conclude and I do so conclude that taking the census in New York in 1980 was more difficult than taking the 1970 census.

Based on the above, the Census Bureau undertook to utilize several procedures including the non-household sources check and the local review program for the first time for the purpose of improving Census Bureau coverage of the entire population. Plaintiff's Ex. 327 at 1; Tr. at 1252—54.

Preliminary estimates from the Census Bureau indicate a national "measured undercount" of only 0.4 percent of the

population. Affid. of Jacob Siegel, sworn to Nov. 17, 1980 at ¶ 2. The "measured undercount" a term of recent vintage, *see* Plaintiffs' Memo on Recordings of October 16—17, 1980 Conference at Census Bureau at 17, is determined by subtracting the gross overcount from the gross undercount. The Census Bureau nevertheless concedes that there must have been some net undercount in 1980 and that it probably is about one or two percent of the total population, more or less. Tr. at 1396—97. Moreover, while the national gross undercount and gross overcount may cancel each other out there is no evidence that this will occur at the sub-national level. Rather, the evidence indicates that the incidence of an overcount and an undercount in the same geographic area is unlikely because the factors which produce an overcount are different from those that cause an undercount. Plaintiff's Ex. 193 at ¶¶ 46—47. Furthermore, the Bureau's estimates with respect to the "measured undercount" are speculative because they are based on a comparison of up-dated 1970 population figures for individual places and the preliminary 1980 counts for those places. Finally, the "measured undercount" figure does not include the illegal alien population which may number as many as 5 million persons. *Id.* at 1362—63.

While the "measured undercount" for the nation has been reduced to almost zero by the latest estimates, the Census Bureau has no evidence that there has been a decrease in the differential undercoverage of the groups that traditionally are "hard to enumerate." Plaintiff's Memo on Recordings of October 16—17 at 3; Tr. at 1374. There is, however, evidence from independent surveys that the populations of New York State and New York City which contain relatively large numbers of the "hard to enumerate" were undercounted in 1980 in differentially high proportions to that of the nation as a whole.

Conservative estimates of the undercount in 1980 for New York City ranged from 517,000 to 650,000 and for New York State ranged from 772,000 to 905,000. Plaintiff's Ex. 235 at ¶ 19. The results of a random phone survey of New York City

and New York State residents conducted between August 20, 1980 and September 11, 1980 by the independent public affairs research organization, Penn & Schoen, indicate that 6% of the population of New York State and 8% of the population of New York City have not been counted by the Census Bureau. Plaintiff's Ex. 269 at ¶ 4. While the defendant's have challenged the reliability of this survey I find that it is entitled to some weight in demonstrating the magnitude of the undercount in New York. *But see* Defendant's Ex. 52. Other evidence of the undercount in New York are the results of "Were You Counted Campaigns" in New York City and Rochester. The results of the New York City "Were You Counted" campaigns show that 18,109 or 11.2% of the 161,718 applicants or recipients interviewed by 41 Income Maintenance Centers, 8 recertification offices and 16 non-public assistance Food Stamp Offices of the New York City Human Resources Administration had not been counted. A mail survey conducted of all 302,000 households in the New York City Income Maintenance Program indicated that of the 281,130 households that responded, 217,325 stated that they had returned a census form or were visited by a census taker, 41,175 did not answer the question and 22,720 or 8% of the respondents stated that they did not return a census form or were not visited by a census enumerator.

Defendants have submitted a preliminary report on the processing of "Were You Counted" forms for New York City. *See* Affid. of William Starr, sworn to Dec. 1, 1980. The results indicate that 9,796 or approximately two-thirds of the 15,158 individuals who claimed they were not counted lived in households from which the Census Bureau had already received a mail questionnaire or a field return questionnaire showing an equal or greater number of persons. *See* Ex. B, lines 4 and 5. Of the remaining one-third or 5,362 persons, 83.04 percent of the individuals contacted by the Census Bureau were found to have been missed by the census. Of 2,123 persons contacted by the Bureau 1,763 were added to existing census figures. If the 3,239 individuals who were not contacted by the Census Bureau

are deemed to have been missed at the same rate as persons already reached by the Bureau, this would result in the addition of 2,688 (83% of 3,239) individuals to existing census counts. The total figures would then reveal that of 15,158 individuals who claimed they had not been counted, 4,451 or 29.4% were in fact not counted. Of course, many more individuals have submitted "Were You Counted" forms in New York City and approximately 30 percent of that population were most likely missed by the Bureau.

In the City of Rochester "Were You Counted Campaign," 7 to 10 percent of those contacted stated that they had not been enumerated. Tr. 600, 602. Of those who claimed they had been missed by the Census Bureau, approximately 60% were verified by the Census Bureau as not having been enumerated. Tr. at 600-607; Plaintiff's Ex. 320.

ADJUSTMENT

In response to the order of the District Court for the Eastern District of Michigan,[7] the Bureau has prepared a report on the feasibility of undertaking a "statistically defensible"[8] method of adjusting population figures from the 1980 census. The Bureau's conclusion as stated in its report which has been received in evidence in this case is that at this time it is unable to develop a "statistically defensible" method of measuring the national undercount, if any, in 1980. Defendant's Ex. 23 at 3. According to the Bureau, "[s]ince the present measurement of the undercount is unreliable even at the natioal level, no method of adjusting for the undercount is statisticlly defensible

7. *See Young v. Klutznick*, 497 F.Supp. 1318 (E.D.Mich., 1980).

8. In response to Judge Gilmore's direction to develop a "statistically defensible" method for adjusting the undercount the Bureau developed a definition of statistical defensibility. The criteria used by the Bureau to define a statistically defensible procedure are (1) appropriateness to use to be made of the results; (2) provision of measures of uncertainty; (3) listing and verification of assumptions; demonstration of robustness; (4) description of data sources, reliability and limitations; (5) reproductibility; (6) timeliness; (7) least cost for given degree of uncertainty. Defendants' Ex. 23 at 4—9.

for 1980." *Id.* at 35. The Bureau asserts, however, that "if good undercount data were available, some . . . methods [of adjustment] would be defensible at the national level, some at the State and standard metropolitan statistical area ("SMSA") level, but none would be defensible at lower levels of geography." *Id.* The Bureau nevertheless submitted a proposal for adjusting census data in the Detroit case should the court order the Bureau to adjust.

DISCUSSION

The principal issues before the Court are (1) whether there was a disproportionate undercount of the population of New York City and New York State in the 1980 census; (2) whether the Census Bureau has mismanaged the 1980 census either in the manner in which it was planned or in execution or both; (3) whether mismanagement, if any, contributed to the undercount of the population of New York; (4) whether there are methods of adjusting the 1980 census that will produce more accurate population counts for New York than the unadjusted figures; (5) whether defendants are required to utilize a reasonable and scientifically valid statistical, survey or sampling method to adjust for the undercount in the population tabulations reported to the President pursuant to 13 U.S.C. § 141(b); (6) whether the Bureau must report census figures to the President by the December 31, 1980 deadline even though those figures are not adjusted for the disporportionate undercount.[9]

---

9. Defendants, in their post-trial brief assert again that plaintiffs lack standing to bring this lawsuit. They contend that while the Court, in determining defendants' motion to dismiss, was required to accept as true that New York State would be deprived of its rightful share of representatives if the undercount were not remedied, it may no longer do so after trial. Defendants argue that at trial plaintiffs did not establish any facts which would entitle them to maintain this suit and therefore, the Court should now dismiss for lack of standing. This argument is meritless and indicates to this Court that defendants fundamentally misconceive the standing issue. In analyzing a standing question, the court's focus should be on "whether the plaintiff [has alleged] that the challenged action has caused him injury in

A. *The Mismanagement Claims*

Plaintiff's claims as to mismanagement are directed to the plans and methodology developed by the Census Bureau for carrying out the 1980 census as well as to the manner in which the census was conducted. In reviewing the methodology devised by the Census Bureau and the manner in which the decennial census was carried out, the Count is limited to determining whether the administrative decision was arbitrary, capricious, or an abuse of discretion. *Carey v. Klutznick,* 637 F.2d 834 (2d cir., 1980); *see Dunlop v. Bachowski,* 421 U.S. 560, 567, 95 S.Ct. 1851, 1857, 44 L.Ed.2d 377 (1975); *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971); *Borough of Bethel Park v. Stans,* 449 F.2d 575 (3d Cir. 1971); *Young v. Klutznick,* 497 F.Supp. 1318 (E.D.Mich., 1980); *City of Camden v. Plotkin,* 466 F.Supp. 44, 51-53 (D.N.J.1978); *West End Neighborhood Corp. v. Stans,* 312 F.Supp. 1066 (D.D.C. 1970); *Quon v. Stans,* 309 F.Supp. 604 (N.D. Cal. 1970). Bearing in mind that the Census bureau's decisions enjoy a presumption of regularity and that the court may not substitute its judgment for that of the Bureau, the Court's focus must be on the "reasonableness of or rational basis for" the methodology of the 1980 census and the manner in which it was executed. *City of Camden v. Plotkin,* 466 F.Supp. at 52-53. Thus, the court must assess whether the defendants acted within the scope of the authority granted to them by Congress, whether the decision was premised on a " 'consideration of relevant factors and whether there has been a clear error of judgement.' " *Id.* at 53 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. at 416, 91 S.Ct. at 823.)

---

fact, economic or otherwise." *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 152, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970). As is evident from the foregoing language, the inquiry into standing is predicated on the allegations of the complaint. This assumes that the allegations are accepted as true, regardless of the stage at which the issue is raised. Thus, if a plaintiff ultimately fails to establish his claims at trial, this would result in a dismissal on the merits and not for lack of standing. In any event, defendants' challenge on this ground is moot in view of the Court's conclusion that plaintiffs have demonstrated that they will be injured by a failure to remedy the undercount in New York.

The record clearly demonstrates that the Census Bureau did not abuse its discretion, or act in an arbitrary or capricious fashion with respect to the procedures planned for the 1980 census. There is no doubt that the Bureau acted within the scope of the authority granted to it by Congress in devising its plans for the 1980 decennial census. The procedures were designed in good faith for the purpose of enumerating the whole number of persons in each state as of April 1, 1980 with results to be made available to the President by December 31, 1980 for the purpose of apportionment. *See* 13 U.S.C. § 141. Furthermore, it is clear that the plans were developed only after a careful review of the many factors that must be considered in attempting a task as mammoth as counting the population of the United States. The Bureau's decisions were based in large measure on prior experience with the task. While the underlying plan for 1980 was quite similar to that utilized in prior censuses, the Bureau expanded the use of certain procedures such as the mailed questionnaire that had proven very effective in the 1970 census. It also developed several innovative procedures designed to improve coverage of the entire population such as the local review program and it planned procedures for enumerating the minority populations who from prior experience generally were differentially undercounted. Although there may be certain areas in which the Census Bureau's plans could have been improved further, the Court finds that the overall methodology for the 1980 decennial census was reasonable. As is evident from my earlier discussion of the procedures employed by the Bureau the plan which was set forth in numerous Census Bureau manuals was detailed, was realistic in its procedures for checking and rechecking, was reasonable as to the planned timing and sequence of procedures, and was rational with respect to the programs devised for coverage improvement. As stated by Dr. Hauser, the Census Bureau "has done very well in the methods they have adopted within the [budgetary constraints with which they . . . operate." Plaintiffs Ex. 317, part III at 12—13.

Addressing next the implementation of the foregoing methodology in New York, the Court finds that the Bureau's

conduct was on the whole unreasonable and at times irrational. First was the failure to commence census operations in a timely fashion in New York. Second was the use of grossly deficient Master Address Registers for certain areas of New York City, the use of poorly trained precanvass enumerators to complete the address registers, a task crucial in procuring an accurate count of the population, the use of out-dated maps or the failure to provide maps, and the failure to correct the address registers following the advance Post Office checks.

Thus, from the outset, there were numerous instances in which Bureau procedures were cancelled, curtailed, or carried out in a shoddy manner because of time pressures. The more procedures were abbreviated because of time pressures, the more subsequent follow-up procedures became overburdened to the point where offices were closed with a substantial amount of follow-up work still to be done. Near chaos in some district offices was the ultimate result of the failure to permit the office to complete the procedures originally planned.

When problems at the district office level were identified to regional headquarters there often was no response or if there was a response, it frequently was a direction to just get the job done regardless of its quality. For example, the Bureau failed to respond to objections that the piece-rate pay structure did not permit many enumerators to earn a salary reflective of their effort and productivity in areas where enumeration was difficult. The failure to adopt an hourly-rate pay structure was a direct cause of the high turnover rate among enumerators as well as the type of falsification of questionnaires known as curbstoning as well as other types of fraud. Regional headquarters also failed to respond to requests for increased advertising of census operations generally and for paid advertising in minority news media despite the Bureau's awareness that special efforts were needed to avoid undercounting minority communities. It is clear that such conduct by the Bureau was unreasonable in light of the low mail return rates experienced in New York City.

The time pressures constantly imposed upon enumerators, crew leaders and district office managers also were unreasonable insofar as the Bureau knew that enumeration could not be completed within the time constraints placed upon personnel.

Another aspect of the Bureau's irrational conduct in implementing the plans for the 1980 census is the manner in which definitions were changed on a constant basis, making it impossible for enumerators to work with viable standards to guide them. Similar to this is the Bureau's conflicting directives concerning the point at which an office could close down with respect to the number of cases still outstanding. In some offices the figures changed from 2% to 5%, and in other offices a higher rate was permissible.

Understaffing at the enumerator level was pervasive in New York City. The Bureau nevertheless failed to take corrective action such as altering its pay scale in order to retain the personnel it did have and attract new personnel.

The lack of adequate training for enumerators involved in complex precedures, and a lack of prior supervisory experience in crew leaders and district office managers also was a pervasive problem. The Bureau, however, seemed unconcerned about the impact these factors would have on the quality of the resultant count.

B. *Undercount*

As has been noted above, an undercount of the population occurred in the 1950, 1960, and 1970 censuses. The undercount in the past has been disproportionate as to Blacks and Hispanics. There is reason to believe that aliens, legal and especially illegal, are also undercounted in a disproportionate manner. The national undercount rate in 1970 was 2.5 percent. An estimate of the undercount for New York in 1970 is that 4.2% of the New York City population and 3.1 percent of the State population was not counted. The rates at which blacks and other minorities were undercounted in 1970 in New York State and City were disproportionately high as compared to the

white population. *See* Plaintiff's Ex. 235 at ¶¶ 14-15. It is undisputed that a large portion of the New York City population consists of blacks, hispanics, other minorities, and legal and illegal aliens. Because of this, New York City is an area that from past experience is difficult to enumerate. Demographic changes during the past decade have exacerbated the difficulty of taking the census in 1980. The inescapable conclusion from the foregoing is that unless the Census Bureau made extraordinary efforts to count the New York City population in 1980, there again would be a disproportionate undercount in New York City and in New York State.

Statistical evidence submitted by the parties confirms this conclusion. While defendant's claim that the national "measured undercount" approaches zero, independent studies, estimates, and preliminary results of the "Were You Counted" campaign reveal an undercount of about five or six percent for New York State and of about seven or eight percent in New York City. While these studies are not conclusive of the extent of the undercount in New York, common sense tells us that these estimates are more realistic than the Census Bureau's conclusion that no disproportionate undercount has occurred in this state and city, and that the "measured undercount" for the nation is about zero, a conclusion that even the Bureau believes is unreliable. Consequently, this Court finds that there has been a disproportionate undercount of the population of New York State and New York City as compared to the nation as a whole in the 1980 census.

Despite their knowledge that extraordinary efforts were necessary to count the population of New York City because it is difficult to enumerate, the Bureau as discussed above nevertheless failed to exert that effort in a manner that was reasonably calculated to overcome the inherent problems associated with census-taking in New York. It is clear that the unreasonable and sometimes irrational decisions made at national and regional headquarters further contributed to the underenumeration of the New York population in 1980.

The full extent of underenumeration in New York is unknown. The factors contributing to this lack of Bureau knowledge have been recited above and will not be repeated. Because of their failure to produce MAR's, FARs, and vacant housing unit reports, the defendants were precluded from introducing evidence which may have permitted the court to determine what the true numbers for New York are. Because they introduced no evidence to rebut the plaintiff's showing of an undercount in New York that is disproportionate to the national average, they have failed to rebut the *prima facie* case established by plaintiffs.

C. *Adjustment*

While the Census Bureau has taken the position that it is unable to develop "statistically defensible' methods of adjustment, the Court finds that what is required here is not a scientifically perfect method for adjusting but a method that will reflect the true population of the city and the state more accurately than the unadjusted counts. The Court recognizes the difficulties posed by the task they must undertake. The task nevertheless must be accomplished.

The Bureau had planned to use three procedures to evaluate the accuracy of the 1980 census. They are demographic analysis, and the Post Enumeration Program, the CPS—IRS Match Study. The demographic method of analyzing the undercount provides estimates of net underenumeration for the total population and estimates of net census error for age, sex, and race groups. This data can be available by as early as January 1981. The Post Enumeration Program will provide estimates of the undercount for states, regions and SMSA's. This data can be available in September of 1981. The final procedure is the CPS—IRS Match. This procedure involves a comparison of Current Population Survey data with Internal Revenue Service records and provides estimates of differences in coverage for Blacks, Hispanics and all other groups. The results of this procedure can be available as early as February 1981. While the bureau has stated that the

data produced by these studies is useful only for evaluation and not for adjustment, it appears to the Court that these techniques can and must be utilized by the Bureau to determine the extent of the undercount at national and sub-national levels so that adjustments may be made where necessary to increase the accuracy of the unadjusted counts. This action is required to prevent an unwarranted dilution of the votes of New York City and New York State residents. The Constitution requires no less. *See Carey v. Klutznick,* 637 F.2d 834 at 838 (2d Cir. 1980); *accord, Young v. Klutznick,* 497 F.Supp. 1318 at 1333 (E.D.Mich. 1980).

The final issue that must be addressed is that of whether the statutory deadline of December 31, 1980 for the Bureau to report population figures to the President must be observed. *See* 13 U.S.C. § 141(b). Plaintiffs assert that the provision is unconstitutional insofar as it would result in the use of inaccurate population figures for apportionment. I do not find it necessary to reach that issue because the question can be decided as a matter of statutory construction. *See Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346-48, 56 S.Ct. 466, 482-483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

Statutory time limits are either discretionary or mandatory. A time limit is not mandatory unless it both requires action within a specified time period and prescribes a consequence for failure to act within that time. *See Fort Worth National Corp. v. Federal Savings & Loan Insurance Corp.,* 469 F.2d 47, 58 (5th Cir. 1972); *Diamond Match Co. v. United States,* 181 F.Supp. 952, 958-59 (U.S. Customs Ct. 1960). It is apparent from the face of the statute that no sanctions are imposed if the Dec. 31 deadline is not met. It also is clear that the date set by the statute was provided for the purpose of orderly administration of the reapportionment process. To require the Bureau to report patently uncertain population figures to the President merely to meet the deadline, would defeat this goal. *See Markham v. Cabell,* 326 U.S. 404, 409, 66 S.Ct. 193, 195, 90 L.Ed. 165 (1945); *Sorrells v. United States,* 287 U.S. 435, 446, 53 S.Ct. 210, 214, 77 L.E.d. 413 (1932). Consequently, it is clear that the December 31 date is directory, not mandatory. *See Carey v. Klutznick,* 637 F.2d 834 at 837 (2d Cir. 1980).

CONCLUSION

In accordance with the above, I hold that there has been an undercount of the population of New York City and New York State that is disproportionate to the national average and that Census Bureau mismanagement in the implementation of the plan for the decennial census contributed to the undercount. I also hold that there are statistical methods available to the Bureau that will produce more accurate census data than the unadjusted counts and that the Bureau is required to utilize these methods to implement an adjustment. Finally, I find that the Bureau is not required to submit population totals to the President by December 31, 1980.

Judgment is rendered in favor of the plaintiffs:

1. Restraining the defendants from certifying population totals to the President on December 31, 1980;

2. Requiring the defendants to adjust population figures for 1980 for New York State and its subdivisions and New York City in particular in a reasonable and scientific manner to compensate for the disproportionate undercount;

3. Declaring that the use of reasonable and scientifically valid statistical, survey or sampling procedures to adjust census figures for the differential undercount is constitutionally permissible;

4. Declaring that the statutory deadline of December 31, 1980 for reporting census figures to the President contained in the Census Act is directory and not mandatory;

5. Directing the Census Bureau to report to this Court within thirty days from the date of this opinion its plan to effectuate the rulings of this Court.

No stay pending appeal shall be granted.

A judgment so providing shall be submitted by plaintiffs on notice forthwith.

SO ORDERED.

Appendix E

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

HUGH L. CAREY, EDWARD I. KOCH, ALAN CHOU, ROSE L. DAWSON, SAMUEL LEFKOWITZ, MICHAEL LOIZOU, EDWIN MARTINEZ, WALTER E. MARX, BRUNILDA PACHECO, LAMUEL STANISLAUS, THE STATE OF NEW YORK, AND THE CITY OF NEW YORK,

Plaintiffs,

—against—

PHILIP M. KLUTZNICK, Secretary of Commerce, VINCENT P. BARABBA, Director, Bureau of the Census, RICHARD BITZER, Acting Assistant Regional Director, New York Region, Bureau of the Census, ARTHUR G. DUKAKIS, Regional Director, Boston Region, Bureau of the Census, UNITED STATES DEPARTMENT OF COMMERCE, Bureau of the Census, JIMMY CARTER, President of the United States, EDMUND L. HENSHAW, JR., Clerk of the United States House of Representatives,

Defendants.

80 Civ. 4550 (HFW)

JUDGEMENT

The issues in the above-entitled action, having been brought on regularly for trial before the Hon. Henry F. Werker on November 12, 1980, and, at the close of trial, the Court having reserved decision;

NOW, upon the Court's Opinion and Order entered December 23, 1980, it is

1. DECLARED that the use of reasonable and scientifically valid statistical, survey or sampling procedures to adjust census

figures for the differential undercount is constitutionally permissible;

2. DECLARED that the statutory deadline of December 31, 1980, for reporting census figures to the President contained in the Census Act is directory and not mandatory;

3. ORDERED, ADJUDGED and DECREED that defendants adjust population figures for 1980 for New York State and its subdivisions and New York City in particular in a reasonable and scientific manner to compensate for the disproportionate undercount and in conformity with the decisions of this Court of October 10 and December 23, 1980;

4. ORDERED, ADJUDGED and DECREED that the Census Bureau report to this Court within thirty days from the date of this opinion its plan to effectuate the rulings of this Court;

5. ORDERED, ADJUDGED and DECREED that defendants are restrained from certifying population totals for New York to the President on or before December 31, 1980, or thereafter until such time as they have fully complied with this judgment.

6. ORDERED that this Court retains jurisdiction of this action to ensure compliance with the rulings of this Court.

Dated: New York, New York
December 30th, 1980

/s/ HENRY F. WERKER
Hon. Henry F. Werker, U.S.D.J.

/s/ Raymond F. Burghardt
Raymond F. Burghardt, Clerk
Southern District of New York

Appendix F

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HUGH L. CAREY, et al.,

Plaintiffs,

—*against*—

PHILIP M. KLUTZNICK, et al.,

Defendants.

80 Civ. 4550 (HFW)

ORDER

WHEREAS:

(a) On August 29, 1980, plaintiffs served a Supplemental Request for Expedited Production of Documents calling for production by defendants of (1) the Master Address Registers ("MAR's") for New York City and State, and (2) listings of vacant housing units found in New York City and State. On September 3, defendants filed their Response and Objections to Plaintiffs' Supplemental Request for Expedited Production of Documents, which stated that defendants refused to produce the documents on the ground that they are confidential under 13 U.S.C. §§ 8 and 9.

(b) At a status conference before the Court on September 4, 1980, argument was had on plaintiffs'

supplemental production request. On September 5, 1980, defendants filed a Motion for a Protective Order against production of the requested documents. Also on September 5, 1980, pursuant to the instructions of this Court, both parties submitted briefs and argued before this Court in support of their respective positions on the issue of confidentiality of such documents. After argument on September 5, defendants sent a letter to this Court requesting a three-day stay of any disclosure order entered concerning said production request.

(c) The defendants, in their brief and oral argument, relied principally on the following contentions:

(1) Under 13 U.S.C. § 9(a), by judicial decision, and by Congressional intent, MAR's and lists of vacant housing units are absolutely privileged from disclosure to anyone other than officers or employees of the Department of Commerce;

(2) The policy underlying the confidentiality afforded census data under 13 U.S.C. § 9(a) is to assure voluntary compliance by census respondents so that accurate census data can be compiled;

(3) It will not be possible to process the census data from New York unless the MAR's are available to census processors in Jeffersonville, Indiana, although the Follow-Up Address Registers ("FAR's") which closely approximate the Master Address Registers are not essential to the census processing function.

(d) Plaintiffs disputed these arguments and relied principally on the following contentions:

(1) The purpose of the confidentiality afforded certain data gathered by the Census Bureau under 13 U.S.C. § 9 is to assure that respondents will not be identified as a result of responding to the census. This concern is not implicated by plaintiffs' request for lists

of vacant housing units of MAR's/FAR's because plaintiffs do not seek disclosure of names of census respondents;

(2) In any event, 13 U.S.C. § 9(c)(1) does not bar disclosure since the Census Bureau is prohibited only from "use [of] the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied". Plaintiffs will use these lists for precisely those statistical purposes for which that information was intended—to ensure an accurate count of New Yorkers in the 1980 decennial census;

(3) A fair reading of the term "furnished" in view of the purpose of § 9 is that it is intended to encompass personal information provided to the Census Bureau by census respondents;

(4) The other subsections of § 9 are inapplicable to this case. Plaintiffs seek no "publication" (§ 9(a)(2)), and plaintiffs do not seek to examine census questionnaires (§ 9(a)(3)). Furthermore, were § 9(c)(1), which only prohibits "use" of data, as broad as defendants claim, §§ 9(a)(2) and (a)(3) would be mere surplusage;

(5) This Court can enter a protective order under Fed. R. Civ. P. 26(c) to protect any legitimate confidentiality interest asserted by defendants;

(6) As part of such protective order, persons given access to the requested documents could be sworn to observe the limitations of § 9 pursuant to 13 U.S.C. § 23(c), which specifically includes employees of State or local agencies among those who may be so sworn.

(e) At the Court's direction, after the conclusion of the oral argument on September 5, plaintiffs took the deposition of Census Bureau official George E. Hall con-

cerning the format of the requested documents and the nature and sources of the information contained therein.

Based upon consideration of the foregoing and upon all other prior papers and proceedings herein, it is hereby

ORDERED that defendants shall produce to plaintiffs by September 10, 1980, the FAR's for the City and State of New York for use in checking the accuracy of defendants' conduct of the 1980 decennial census except that as to those Census Bureau District Offices in New York State which have been closed or from which FAR's have been removed by the Census Bureau, the FAR's for those offices shall be produced to the plaintiffs by September 12, 1980; and it is further

ORDERED that defendants shall produce to plaintiffs by September 10, 1980, for use in checking the accuracy of defendants' conduct of the 1980 decennial census:

(a) all lists compiled by the Census Bureau of vacant or nonexistent household units in the City and State of New York; and

(b) all Census Bureau D-160 forms for housing units in the City and State of New York other than those indicating that the household unit is occupied; and it is further

ORDERED that plaintiffs and their attorneys shall use the documents produced pursuant to this order solely for the purpose of helping to ensure an accurate count of the whole number of persons in New York in the 1980 decennial census, and such documents shall not be used or disclosed to any other person for any other purpose whatsoever; and it is further

ORDERED that any person granted access to the documents produced pursuant to this Order shall be sworn to confidentiality pursuant to 13 U.S.C. § 23(c); and it is further

ORDERED that in producing the documents required herein, defendants may redact such documents to remove from them

only the names of persons residing in any household enumerated in the 1980 decennial census; and it is further

ORDERED that defendants' motion for a protective order is granted to the extent provided herein, and is in all other respects denied; and it is further

ORDERED that this order shall be effective upon service on the United States Attorney for the Southern District of New York.

ORDERED that execution of this order shall be stayed until 5 P.M. September 16th 1980.

September 10, 1980

/s/ HENRY F. WERKER
U.S.D.J.

Appendix G

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HUGH L. CAREY, et al.,

Plaintiff,

—*against*—

PHILIP M. KLUTZNICK, et al.,

Defendants.

80 Civ. 4550 (HFW)

ORDER

Upon the affidavits of Vincent P. Barabba, sworn to October 15, 1980, the affidavit of Robert S. Rifkind, sworn to October 18, 1980, and all the prior proceedings had herein, the Court finds that

(1) By order entered on September 11, 1980, pursuant to Rules 34 and 37 Fed. R. Civ. P., this Court ordered defendants to produce for inspection and copying by plaintiffs designated Census Bureau documents clearly relevant to the issues presented in this action, including the Field Address Registers and lists of vacant or nonexistent housing units, including D-160 forms, for the City and State of New York for the 1980 Decennial Census, subject to appropriate limitations to protect the confidentiality interests asserted by defendants.

(2) On September 15, 1980, this Court stayed the production order pending disposition of defendants' application for review by the Court of Appeals. That stay expired by its own terms on October 1, 1980, when the Court of Appeals denied defendants' petition for leave to appeal pursuant to 28 U.S.C. § 1292(b), denied defendants' petition for a writ of mandamus,

and dismissed defendants' appeal pursuant to 28 U.S.C. § 1291. At hearings before the Court on October 6, 1980, and October 15, 1980, the Court admonished defendants to produce the documents covered by the production order forthwith.

(3) Defendants have not produced the documents and have now formally advised the Court that they decline to do so. Accordingly, the Court finds that defendants have knowingly and wilfully placed themselves in contempt of the Court's order of September 11, 1980, and that the imposition of sanctions pursuant to Rule 37(b)(2) is appropriate.

Upon the foregoing findings and the prior proceedings herein, it is hereby

ORDERED that defendants are:

(a) precluded from offering any evidence or testimony in this action to prove any fact, matter or circumstance that would be reflected in or could be derived from the documents required to be produced by the Court's Order of September 11, 1980, or that could be contradicted or impeached by such documents;

(b) precluded from denying or offering evidence or testimony to disprove, the averments of paragraphs 32, 33, 43, 44, 45(a), 45(c), 47(a) and 47(b) of the Complaint; and

(c) precluded from asserting that any delay in reaching a final judgment in this action attributable in whole or in part to defendants' failure to comply with the Court's Order of September 11, 1980, renders unavailable or impracticable any relief that may be sought in this action.

October 22nd, 1980

/s/ HENRY F. WERKER

U.S.D.J.

Appendix H

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 672—September Term, 1980

(Argued December 8, 1980 Decided December 15, 1980)

Docket No. 80-6232

HUGH L. CAREY, EDWARD I. KOCH, ALAN CHOU, ROSE L. DAWSON, SAMUEL LEFKOWITZ, MICHAEL LOIZOU, EDWIN MARTINEZ, WALTER E. MARX, BRUNILDA PACHECO, LAMUEL STANISLAUS, THE STATE OF NEW YORK, and THE CITY OF NEW YORK,

Plaintiffs-Appellees,

—v.—

PHILIP M. KLUTZNICK, Secretary of Commerce, VINCENT P. BARABBA, Director, Bureau of the Census, WILLIAM F. HILL, Regional Director, New York Region, Bureau of the Census, RICHARD BITZER, Acting Assistant Regional Director, New York Region, Bureau of the Census, ARTHUR G. DUKAKIS, Regional Director, Boston Region, Bureau of the Census, UNITED STATES DEPARTMENT OF COMMERCE, Bureau of the Census, JIMMY CARTER, President of the United States, EDMUND L. HENSHAW, JR., Clerk of the United States House of Representatives,

Defendants-Appellants.

Before:

OAKES and MESKILL, *Circuit Judges,* and GAGLIARDI,* *District Judge.*

Appeal from an order of the United States District Court for the Southern District of New York, Henry F. Werker, *Judge,* granting a preliminary injunction requiring the Census Bureau (1) to compare a list of 1.2 million names with the Bureau's own records in order to find individuals not counted in the 1980 census and (2) for the same purpose, to accept and process "Were You Counted" forms mailed to the Bureau from addresses in the State of New York.

Judgment affirmed.

PETER BIENSTOCK (Robert Abrams, Attorney General of the State of New York, Sheila Abdus-Salaam, Daniel Berger, New York, New York, of counsel), *for Plaintiffs-Appellees, Hugh L. Carey and the State of New York.*

ALLEN G. SCHWARTZ, Corporation Counsel of the City of New York, Mary McCorry, New York, New York, of counsel, *for Plaintiffs-Appellees, the City of New York and Edward I. Koch.*

* Honorable Lee P. Gagliardi of the United States District Court for the Southern District of New York, sitting by designation.

FREDERICK A. O. SCHWARZ, JR. (Robert S. Rifkind, David A. Barrett, Roger H. Cummings, Michael J. Malone, John A. Redmon, Cravath, Swaine & Moore, New York, New York, of counsel), *for all other Plaintiffs-Appellees.*

MICHAEL H. DOLINGER (John S. Martin, Jr., United States Attorney for the Southern District of New York, Jane E. Booth, Steven E. Obus, New York, New York, of counsel), *for Defendants-Appellants.*

PER CURIAM:

This appeal, taken pursuant to 28 U.S.C. § 1292(a)(1), is from the grant of a preliminary injunction against the appellants, who collectively will be called the Census Bureau. The underlying action challenges the manner in which the Census Bureau conducted the 1980 census in the State of New York. It arises under Article I, section 2, clause 3, of the Constitution, section 2 of the Fourteenth Amendment, and the First, Fifth, and Fifteenth Amendments, as well as the statutes relating to the taking of the census and to the apportionment of representatives, 13 U.S.C. §§ 1-307 and 2 U.S.C. § 2(a), and the Administrative Procedure Act, 5 U.S.C. §§ 551-576, 701-706. The appellees asserted that jurisdiction was conferred by 28 U.S.C. §§ 1331, 1337, 1361 and by 5 U.S.C. § 702, and they sought declaratory and injunctive relief.

The appellees include the City of New York and its mayor; the governor of the state; and several voters and

taxpayers in various city, congressional, state senatorial and state assembly districts. Their basic complaint is that the census was conducted in a manner that will inevitably result in an undercount, an undercount that will not be evenly distributed across the state but that instead will occur at a higher rate in low-income areas populated largely by members of minority groups. A principal factual allegation is that the master address registers ("MARs") prepared for New York City were grossly inadequate because they were compiled from private commercial mailing lists that were out of date, incomplete, and lacked names of residents of poor and minority neighborhoods. Appellees also allege that the follow-up check of the MARs by the postal service and census workers was wholly inadequate. The appellees' ultimate contentions are that the resulting undercount not only will cause New York to lose at least one congressional seat to which it is entitled when the reapportionment is made, but that it also will result in the dilution of the votes of New York City residents—particularly members of minority groups—vis-a-vis those of other residents of the state with respect to the state legislature, and will generally cost the city and the state vast sums of money distributed under federal revenue sharing and other programs with statutory formulas tied to the census.

Originally the appellees sought a preliminary injunction enjoining the closing of census offices in the State of New York, but when the Census Bureau closed a large number of its district offices the request was modified; the appellees asked the district court to require the Census Bureau to process certain "Were You Counted" forms and to compare with Census Bureau records of New York City residents a computerized list of 1.2 million persons in

New York City eligible for Medicaid.[1] They assert that this relief is necessary, despite any statistical adjustments that ultimately might be ordered in the underlying action, because they are entitled to the most accurate head count feasible as a basis for any subsequent statistical adjustment. Judge Werker found that the appellees had established the possibility of irreparable harm to the efficacy of their votes if the Census Bureau were not required to consider the "Were You Counted" forms and the computer list, and that this possibility was clear. He also found that the appellees are likely to succeed on the merits because they had submitted significant evidence concerning Census Bureau mismanagement and had raised serious questions as to whether some of the policies and procedures employed by the Census Bureau were carried out in an irrational or arbitrary manner.

The Census Bureau argues that appellees did not demonstrate irreparable harm but merely a "possibility" of irreparable harm, that appellees failed to demonstrate a sufficient prospect of success on the merits to justify a preliminary injunction, and that the lower court entered the preliminary injunction in disregard of governing equitable principles. The Bureau notes that we have power of "full review" on appeal because the trial court did not hold an evidentiary hearing. *See Jack Kahn Music Co. v. Baldwin Piano & Organ Co.*, 604 F.2d 755, 758 (2d Cir. 1979); *Forts v. Ward*, 566 F.2d 849, 852 n.8 (2d Cir. 1977).

In terms of a showing of irreparable harm, *see Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979), the Census Bureau makes both a factual

---

1 Comparing Census Bureau records with the computerized Medicaid list is not just a matter of cross-checking, but necessarily involves a field check when discrepancies are discovered.

and a legal argument. The factual argument is that appellees can obtain the full measure of the relief they seek after trial. However, even though it may be possible to make statistical adjustments at a later date, there is no indication that changes in the conventional head count can or would be made once census figures are reported. As each day passes, retroactive head counting becomes more difficult—memories fade and people move. The computer list supplied by the appellees and the "Were You Counted" forms are both devices for adjusting the head count, and the Bureau has maintained that only head count figures can be included in the official census used for apportionment. It is quite apparent, therefore, that absent interim relief and with the filing of the current census figures by the December 31, 1980 deadline, *see* 13 U.S.C. § 141(b), appellees would be denied any appropriate increase in their head count. As such, appellees would be irreparably harmed by deprivation of their right to a fair apportionment.

As for the Census Bureau's legal argument, it is based on Judge Werker's use of the phrase "[t]he possibility of irreparable harm." The Bureau points out that an injunction "may not be used simply to eliminate a possibility of a remote future injury," *New York v. Nuclear Regulatory Commission,* 550 F.2d 745, 755 (2d Cir. 1977). Although the irreparable injury that the appellees sought to avert was a "possibility," every irreparable injury is merely a possibility until it is actual and can no longer be averted. Real and imminent, not remote, irreparable harm is what must be demonstrated and we think was demonstrated here for the reasons stated above. In this connection, the fact that the order concerning the computer list was mandatory in nature is justifiable because it constituted an equitable effort by the court to restore the "status

quo," which was destroyed when the Census Bureau unilaterally closed its district offices during the pendency of a preliminary injunction motion to keep them open.

The Census Bureau also argues that if the injunction is enforced the Bureau cannot meet the statutory deadline of December 31, 1980 for filing the census report, *see* 13 U.S.C. § 141(b), and that it does not have the employees available to perform the functions ordered by the lower court. We see nothing sacred in the due date of the filing, especially when the work of the Census Bureau, at least as preliminarily demonstrated below, is incomplete. *See Young v. Klutznick,* No. 80-71330 (E.D. Mich. Sept. 25, 1980). It is the Bureau's own fault that the deadline is not being met, and in any event the reapportionment process will not commence for some considerable period of time thereafter. The mandatory injunction does involve work on the part of the Bureau, but the fact that some funds may have to be expended to hire additional personnel seems hardly a substantial problem when, according to the press, the Census Bureau spent $1 billion for its overall operation, *see Wall St. J.*, Dec. 9, 1980, at 1, col. 1. To be sure, the district court has now conducted a full trial and the parties tell us that a decision on the merits is imminent. If it is a decision in favor of the Census Bureau, it may indeed moot the preliminary injunction at issue here. On the other hand, if appellees' claim is upheld, then injunctive relief ordering further adjustment of the head count may well be necessary to preserve the status quo.

In respect to likelihood of success on the merits, we preliminarily address the Bureau's standing, political question, and justiciability arguments. The Bureau, relying on *Sharrow v. Brown,* 447 F.2d 94 (2d Cir. 1971), *cert. denied,* 405 U.S. 968 (1972), argues that appellees do not

have standing to sue. It is true that in *Sharrow* this court held that the plaintiff lacked standing to challenge the alleged failure of the Census Bureau to adjust the results of the 1970 census by compiling statistics on the number of disenfranchised males in each state, as required by section 2 of the Fourteenth Amendment. Sharrow lacked standing because he had not come forward with any evidence on the alleged census defects and on the effect that proper nationwide enumeration would have had on New York State's number of representatives. This court held that, absent such evidence, potential damage to New York was too speculative to confer standing upon the plaintiff. Here, however, appellees have made a showing—one not made in *Sharrow*—that Census Bureau actions in New York State have caused a disproportionate undercount which will result in loss of representation in Congress.

We agree with the court in *City of Camden v. Plotkin*, 466 F. Supp. 44, 47-51 (D.N.J. 1978), that citizens who challenge a census undercount on the basis, *inter alia*, that improper enumeration will result in loss of funds to their city have established both an injury fairly traceable to the Census Bureau and a substantial probability that court intervention will remedy the plaintiffs' injury. *See Warth v. Seldin*, 422 U.S. 490, 502-08 (1975). The present case is distinguishable from *FAIR v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980), where no plaintiff alleged that his or her own state or congressional district would benefit if the relief sought were granted. The individual plaintiffs in this case have alleged concrete harm in the form of dilution of their votes and decreased federal funds flowing to their city and state, thus establishing their standing. Similarly, New York City and New York State have asserted a direct injury—particularly in light of

the city's present financial condition—traceable to the Bureau's actions, and therefore have standing as recipients of federal funds under revenue sharing. Moreover, the State of New York has standing in its capacity as *parens patriae, see Missouri v. Illinois,* 180 U.S. 208, 241 (1901). *See generally Hawaii v. Standard Oil Co. of California,* 405 U.S. 251, 257-59 (1972).

The Census Bureau argues further that allegations as to mismanagement of the census made in the complaint involve a political question and otherwise fail to state a justiciable claim. The Bureau relies upon Justice Brennan's formulation of the political question doctrine in *Baker v. Carr,* 369 U.S. 186, 217 (1962). However, its only authority for this reliance in the instant case is *Saunders v. Wilkins,* 152 F.2d 235, 237-38 (4th Cir. 1945), *cert. denied,* 328 US. 870 (1946), a decision which we view as inconsistent with *Baker v. Carr,* despite the comments in *Sharrow v. Peyser,* 443 F. Supp. 321, 324 n.5 (S.D.N.Y. 1977), *aff'd mem.,* 582 F.2d 1271 (2d Cir. 1978). Beyond this, appellees assert a substantial constitutional claim and are not merely quibbling over the office procedures utilized by the Census Bureau. We fully recognize that there is no power to review agency action that is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), but this is not one of those "rare instances," *see Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971), where that exception may be invoked. Here, rather, appellees allege an impairment of their "right to a vote free of arbitrary impairment," *Baker v. Carr,* 369 U.S. at 208, a matter which cannot, of course, be foreclosed from judicial review by operation of the Administrative Procedure Act. *See City of Camden v. Plotkin,* 466 F. Supp. at 52-53; *United States v. Little,* 321 F. Supp. 388, 391 (D. Del. 1971) (Census Bureau action

reviewable as to reasonableness of or irrational basis for methods used).

Having disposed of these threshold issues, we also agree with the district court that the appellees have demonstrated a likelihood of success on the merits. Appellees have sufficiently established a factual predicate for their claims to the effect that a census undercount is inevitable, that the undercount is particularly large among minority populations that are heavily concentrated in New York, and that Census Bureau procedures were inadequate in New York to avoid this disproportionate undercount. All of this may deprive New York State and New York City of the congressional representation and the federal funding to which they are entitled under the laws and Constitution of the United States. While mathematical exactness or precision is "hardly a workable constitutional requirement," *Reynolds v. Sims,* 377 U.S. 533, 577 (1964), the Supreme Court has held that Article I, section 2 of the Constitution means that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," *Wesberry v. Sanders,* 376 U.S. 1, 7-8 (1964), and that "our Constitution's plain objective [is to make] equal representation for equal numbers of people the fundamental goal," *id.* at 18. *See also Wells v. Rockefeller,* 394 U.S. 542 (1969); *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969).

Finally, with respect to the equitable principles governing this case, the Census Bureau relies heavily on the statement in *Union Carbide Agricultural Products Co. v. Costle,* No. 79-6200, slip op. 5795, 5801 (2d Cir. Sept. 24, 1980), that when a movant seeks a preliminary injunction which may adversely affect the public interest, "more than a 'fair ground for litigation' must be shown before the action will be stopped in its tracks by court order."

But the public interest has always been a factor to be considered in the granting of a preliminary injunction. *See, e.g., Yakus v. United States,* 321 U.S. 414, 440-41 (1944). The problem is that the Census Bureau assumes that the public interest is solely with it, because it is a public agency. But the public interest also requires obedience to the Constitution and to the requirement that Congress be fairly apportioned, based on accurate census figures. Furthermore, it is in the public interest that the federal government distribute its funds, when the grant statute is keyed to population, on the basis of accurate census data. We see nothing in *Union Carbide* which cuts against appellees here, especially because, as we have already noted, the merits of this case provide more than a "fair ground for litigation."

We believe that what we have said above answers any and all remaining arguments of the Census Bureau, except perhaps the contention that the district court order amounts to an abuse of discretion because it overlooks the impact on other cities and states. We note only that other areas of the country that have similar complaints with Census Bureau methods are also instituting court actions, and these include the City of Detroit and the City of Philadelphia. The argument that a court decision may provide special treatment for the parties involved is one for the ultimate trial on the merits and decision on appeal.

Judgment affirmed.

GAGLIARDI, D.J. (dissenting):

Since I do not believe that the appellees have made the requisite showing of irreparable harm, I would reverse. The issue here is not whether appellees are entitled to ultimate relief, but whether they are entitled to preliminary relief *pendente lite.*

Appellees initially requested preliminary relief to prevent the Census Bureau from closing its local offices. Subsequently, they amended their request and asked that the District Court require the Bureau to compare its count with the computerized Medicaid list and "Were You Counted?" forms.

Appellees have failed to establish that any relief ultimately granted upon a decision on the merits would not be adequate. The Majority finds, and I do not disagree, that the December 31 deadline is without binding legal significance and that a statistical adjustment could be ordered after trial on the merits. The Majority further finds, and again I agree, that retroactive headcounting becomes more difficult with the passage of time. However, the preliminary relief sought and ordered here—cross-checking of lists—is relief that could as easily be ordered and effectuated at a later date.[1] If appellees ultimately succeed, the court could at that time direct continued cross-checking.

Appellees, therefore, have not shown the need for interim relief.

---

1 The record does not support the Majority's assumption that such cross-checking necessarily involves subsequent field checks.

600—12-17-80 • USCA—5009—A
RECORD PRESS, INC., 157 Chambers St., N.Y. 10007 (212) 243-5775

Appendix I

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 947—September Term, 1980

(Argued February 20, 1981 Decided June 12, 1981)

Docket No. 81-6042

HUGH L. CAREY, et al.,

Plaintiffs-Appellees,

—v.—

PHILIP M. KLUTZNICK, et al.,

Defendants-Appellants.

Before:

VAN GRAAFEILAND and MESKILL, *Circuit Judges,*
and STEWART, *District Judge.**

Appeal from a judgment of the United States District Court for the Southern District of New York following a nonjury trial before Werker, *J.*, which directed the Census

* Of the Southern District of New York, sitting by designation.

Bureau to adjust population figures for the State and City of New York. Reversed and remanded for a new trial.

STEVEN E. OBUS, New York City (John S. Martin, United States Attorney for the Southern District of New York, Jane E. Booth, Susan M. Campbell, Michael H. Dolinger, Gaines Gwathmey, III, Thomas D. Warren, Assistant United States Attorneys, New York City, of counsel) *for Defendants-Appellants.*

PETER BIENSTOCK, New York City (Robert Abrams, Attorney General of The State of New York, Robert Hermann, Daniel Berger, New York City, of counsel) *for Plaintiffs-Appellees Hugh L. Carey and The State of New York.*

FREDERICK A.O. SCHWARTZ, JR., New York City (Cravath, Swaine & Moore, New York City, Robert S. Rifkind, John A. Redmon, Roger D. Einerson, Daniel J. Danser, Mark P. Schnapp, David A. Barrett, Michael J. Malone, David B. Watkiss, Morris Waisbrott, Ellen S. Oran, Jeffrey D. Chansler, Alan R. Glickman, Genevieve A. Harris, Thomas S. Szatkowski, of counsel) *for Plaintiffs-Appellees Alan Chou, Rose L. Dawson, Samuel Lefkowitz, Michael Loizou, Edwin Martinez, Walter E. Marx, Brunilda Pacheco and Lemuel Stanislaus.*

ALAN G. SCHWARTZ, Corporation Counsel for The City of New York, New York City (Mary McCorry, New York City, of counsel) *for Plaintiffs-Appellees Edward I. Koch and The City of New York.*

ALLAN BLUMSTEIN, New York City (Paul, Weiss, Rifkind, Wharton & Garrison, New York City, Aryeh S. Friedman, of counsel) *amicus curiae, for the American Jewish Committee.*

JIM LEACH, Washington, D.C. (Member of Congress) *amicus curiae, pro se.*

JACK GREENBERG, New York City (N.A.A.C.P. Legal Defense and Educational Fund, New York City, Bill Lann Lee, Beth Lief, Judith Reed, of counsel) *amicus curiae, for the N.A.A.C.P. Legal Defense and Educational Fund, Inc.*

VILMA S. MARTINEZ, San Francisco, Calif. (Mexican American Legal Defense and Educational Fund, San Francisco, Calif., Morris J. Baller, Mike S. Bernick, of counsel), M.D. Taracido, New York City (Puerto Rican Legal Defense and Educational Fund, New York City, Robert L. Becker, of counsel) *amici curiae, for the National Council of La Raza, Aspira of America, National Concilio of America, National Puerto Rican Forum and United Bronx Parents.*

STEVEN R. SHAPIRO, New York City (New York Civil Liberties Union, New York

City, Arthur Eisenberg, of counsel), Bruce J. Ennis, New York City (American Civil Liberties Union, New York City) *amici curiae, for the New York Civil Liberties Union and American Civil Liberties Union.*

JOHN J. GUNTHER, Washington, D.C. (United States Conference of Mayors, Washington, D.C., Stephen C. Chapple, of counsel), *amicus curiae, for the United States Conference of Mayors.*

VAN GRAAFEILAND, *Citcuit Judge:*

When the first federal census was conducted in 1790, the total population of the United States was less than 4,000,000.[1] New York City, the country's largest municipality, had only 33,000 inhabitants.[2] Despite these relatively small numbers, the census, which was conducted by United States Marshals, did not go smoothly. Transportation and communication were inadequate.[3] Boundaries of towns and cities were often undefined.[4] Cooperation by the citizenry was less than complete. Some people distrusted the newly-formed federal government; others were

1 C. Wright & W. Hunt, *The History and Growth of the United States Census* 17 (1900).

2 U.S. Dep't of Commerce, *The Story of the Census, 1790-1916* 8 (1916).

3 *Id.*

4 *Id.* at 9.

influenced by a fear of increased taxation; many opposed the basic concept of a census.[5]

Because art. 1, § 2, cl. 3 of the then newly-enacted Constitution provided that members of the House of Representatives and direct taxes should be apportioned among the States according to population, it had been anticipated that the census would provide an accurate count. A State's temptation to exaggerate its population count for purposes of congressional representation would be offset by its desire to reduce its apportioned share of direct taxes.[6] However, when the census was finally completed in 1791, there was a fairly wide-spread belief that it had resulted in a substantial undercount.[7]

Although the mechanics of the counting process have been improved in each of the nineteen ensuing censuses, there has never been a perfect count.[8] This is concededly true of the 1980 census. In keeping with the spirit of the times, States and municipalities in various parts of the country are seeking to remedy this most recent imperfection through litigation.[9] Approximately fifty lawsuits have been brought by or on behalf of subordinate govern-

---

5 *Id.*

6 C. Wright & W. Hunt, *supra* note 1, at 13 n.a.

7 *Id.* at 16; The Special Committee on Empirical Data in Legal Decision Making, "The Undercount of the Census", 36 *The Rec. of the Ass'n of the Bar of the City of New York* 24 (1981).

8 *Gaffney v. Cummings*, 412 U.S. 735, 745 n.10 (1973); *Kirkpatrick v. Preisler*, 394 U.S. 526, 539 n.3 (1969) (Fortas, *J.*, concurring).

9 The deterrent effect of direct tax apportionment on State claims of undercount has, of course, been eliminated by the passage of the Sixteenth Amendment.

ment bodies, in each of which the claim of a substantial local or regional undercount is made.[10]

---

10 The inundating effect of this spate of litigation can perhaps best be demonstrated by simply listing the cases involved: *Goodman v. Klutznick*, No. 81-70193 (E.D. Mich.); *Dona Ana County v. Klutznick*, Civ. No. 80-676 M (D.N.M.); *Del Bello v. Klutznick*, No. 80 Civ. 7195 (S.D.N.Y.); *Board of Commissioners v. Klutznick*, No. C-1-81-029 (S.D. Ohio); *Overstreet v. Baldridge*, No. J-81-0007-Civ. (D. Alas.); *Cole v. Klutznick*, No. 81-0049-P.G. (D.P.R.); *Fahy v. Klutznick*, No. 81-617 (D.N.J.); *Sharrow v. Reagan*, No. 81 Civ. 1953 (S.D.N.Y.); *Connell v. Baldridge*, No. Civ. 81-5029-CV-SW (W.D. Mo.); *Meyers v. Baldridge*, No. B-8161-CA (E.D. Tex.); *Munzert v. Baldridge*, No. 80-5369 (S.D. Ill.); *Louisiana v. Klutznick*, No. 81-004-A (M.D. La.); *Spanish Coalition for Jobs v. Klutznick*, No. 80 C 2994 (N.D. Ill.); *New Jersey Apportionment Commission v. Department of Commerce*, No. 81-309 (D.N.J.); *Clark v. Klutznick*, No. 80-4153 (D.N.J.); *City of Hobbs v. Klutznick*, No. 80-792 (D.N.M.); *Sullivan v. Klutznick*, No. A-80-397-Civ. (D.Alas.); *McLaughlin v. Klutznick*, No. 81-7 (D. Del.); *City of College Park v. Klutznick*, No. C-80-2252-A (N.D. Ga.); *City of East Point v. Klutznick*, No. C-80-2227-A (N.D. Ga.); *Hatcher v. Klutznick*, No. H-80-742 (N.D. Ind.); *Conway v. Klutznick*, No. 80-1549-C(3) (E.D. Mo.); *Krodinger v. Klutznick*, No. 80-1636-C(1) (E.D.Mo.); *DeFino v. Klutznick*, No. 80-3896 (D.N.J.); *Gibson v. Klutznick*, No. 80-3438 (D.N.J.); *Jasienski v. Klutznick*, No. 80-4142 (D.N.J.); *New Mexico v. Klutznick*, No. 80-0726-C (D.N.M.); *Lewis v. Klutznick*, No. 80-862-Civ-5 (E.D.N.C.); *Red Lake Bank of Chippewa Indians v. Klutznick*, No. 6 80-644 (D. Minn.); *Drakeford v. Klutznick*, No. C-80-645D (M.D.N.C.); *Padilla v. Klutznick*, No. 80-2570 (D.P.R.); *City of Willacoochee v. Baldridge*, No. CV 581-05 (S.D. Ga.); *City of Terre Haute v. Klutznick*, No. TH 80-242-C (S.D. Ind., dismissed Jan. 29, 1981); *City of Chester v. Klutznick*, No. 80-3309 (E.D. Pa.); *Ferre v. Klutznick*, No 80-2933 (S.D. Fla.); *City of Duluth v. Klutznick*, No. 5-80-150 (D. Minn.); *City of Atlanta v. Klutznick*, No. C-80-1685A (N.D. Ga.); *Massachusetts v. Klutznick*, No. 80-2232-Z (D. Mass.); *City of Owensboro v. Klutznick*, Civ. No. 80-0201-0(J) (W.D. Ky.); *Carey v. Klutznick*, No. 80 Civ. 4550 (S.D.N.Y. Dec. 22, 1980), *appeal argued*, No. 81-6042 (2d Cir. Feb. 20, 1981); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980), *appeal argued*, No. 80-2785 (3d Cir. April 24, 1981); *Carey v. Klutznick*, 503 F. Supp. 874 (N.D. Ill. 1980), *appeal dismissed*, N. 80-2375 (7th Cir. Dec. 31, 1980); *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *appeal docketed*, No. 80-1751 (6th Cir. Dec. 24, 1980), *stay* granted, No. A-533 (U.S. Dec. 24, 1980); *McNichols v. Klutznick*, No. 80-C-1151 (D. Colo., Sept. 17, 1980), *rev'd*, No. 80-2023 (10th Cir. April 17, 1981); *City of Cincinnati v. Klutznick*, *No. C-1-80-475* (S.D. Ohio), dismissed Sept. 11, 1980); *City of Baltimore v. Klutznick*, Civ. No. Y-80-2196 (D. Md.), dismissed Aug.

This is an appeal from a judgment of the United States District Court for the Southern District of New York in an action alleging undercounts in the State and City of New York. The judgment orders the Census Bureau to adjust population figures for the State and City "in a reasonable and scientific manner" and to report to the court within thirty days the Bureau's plan to effectuate the court's ruling.[11] For reasons hereafter assigned, we reverse and remand for a new trial.

Although the census is the delight of statisticians and sociologists and serves as a convenient measuring stick for the dispensing of federal funds, it was not created for those purposes. Its purpose under the Constitution was to determine the apportionment of Representatives among the States. "Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . . ."[12] In reviewing the judgment on appeal, it is important that we keep this basic constitutional purpose in mind.

The House of Representatives has 435 members, and this number must be apportioned among the fifty States.

29, 1980); *Holland v. Klutznick*, No. 80-73302 (E.D. Mich.); *Shapiro v. Klutznick*, No. 80-2638 (D.N.J. Aug. 29, 1980), *aff'd mem.*, No. 80-2466 (3d Cir. Dec. 1, 1980), *stay granted*, 49 U.S.L.W. 3442 (U.S. Dec. 9, 1980) (No. A-490), *cert. granted*, 49 U.S.L.W. 3799 (U.S. April 27, 1981) (No. 80-1436); *Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980) (three-judge court), *appeal dismissed*, 48 U.S.L.W. 3820 (U.S. June 17, 1980), *aff'd per curiam*, No. 80-1246 (D.C. Cir. Nov. 6, 1980), *cert. denied*, 49 U.S.L.W. 3710 (U.S. March 23, 1981) (No. 80-975).

11 The judgment also prohibited the Bureau from certifying New York population totals to the President until the Bureau had fully complied with the judgment. This portion of the judgment was stayed by order of the United States Supreme Court. *Klutznick v. Carey*, 49 U.S.L.W. 3466 (U.S. Dec. 30, 1980) (No. A-567).

12 Art. 1, § 2, cl. 3; *see also* U.S. Const. amend. XIV, § 2; 2 U.S.C. § 2a(a).

If one State gains a member, another must lose one. Following the 1960 census, seven States each gained one seat, one State gained four, and one gained eight. As a result, twelve States each lost one seat, three States each lost two seats, and one State lost three seats.[13] Following the 1970 census, three States each gained one seat, one gained three, and one gained five. Seven States each lost one seat, and two States each lost two seats.[14] In effect, House membership is a fund in which fifty States have an interest. No State's share can be increased without adversely affecting at least one other State. The question presented by litigation such as the one now before us is whether one State can be granted such an increase without full consideration having been given to its effect on other States.

Persons "who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience" are traditionally considered to be indispensable parties.[15] Equity suggests that a person be brought into the litigation if the case cannot be decided on its merits without prejudicing his rights.[16] This not only prevents possible injury to the absent person; it

---

13 U.S. Dep't of Commerce, *Congressional District Data Book* xi (1963).

14 U.S. Dep't of Commerce, *1972 Statistical Abstract of the United States* 363 (93rd ed. 1972).

15 *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48, 52 (1954), quoting *Shields v. Barrow*, 17 How. 129, 139 (1854).

16 *Sandobal v. Armour & Co.*, 429 F.2d 249, 257 (8th Cir. 1970); *Gramatan-Sullivan, Inc. v. Koslow*, 240 F.2d 523, 525 (2d Cir.), *cert. denied*, 353 U.S. 958 (1957); Fed. R. Civ. P. 19(a).

avoids multiplicity of suits and the danger of inconsistent decisions.[17]

Although the present action has already been before this Court on an appeal from a preliminary injunction order, we did not consider any of the factors just set forth. The panel hearing that appeal held only that plaintiffs have standing to sue and that the issue of census mismanagement is justiciable rather than political.[18] The panel did not address appellants' contention that the issuance of the preliminary injunction order was an abuse of discretion because it "overlook[ed] the impact on other cities and states."[19] The panel concluded that "[t]he argument that a court decision may provide special treatment for the parties involved is one for the ultimate trial on the merits and decision on appeal."[20] We have now reached that point in the litigation.

We think it clear beyond cavil that a statistically formulated increase in the population of only one State, such as New York, will have an adverse effect on other States

---

17 *See Ward v. Louisiana Wildlife & Fisheries Commission*, 224 F. Supp. 252, 256 (E.D. La. 1963), *aff'd*, 347 F.2d 234 (5th Cir. 1965). Because the financial and political effects of population apportionment make it a competitive process, the proper method of determining disproportionate undercount would seem to be on a State vs. State basis, rather than that of State vs. national average. If statistical adjustments are to be made, they should be made in all States where needed and in a uniformly fair manner. This is not apt to occur when claims of disproportionate undercount are made in fifty separate cases, particularly when there is no consensus among the experts as to feasible and accurate methods of adjusting undercounts.

18 *See Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980), *stay granted*, 49 U.S.L.W. 3466 (U.S. Dec. 30, 1980) (No. A-567). Despite appellant's urgings, this panel considers itself precluded from reexamining the issues passed on by the prior panel.

19 637 F.2d at 839.

20 *Id.*

which are entitled to, but do not receive, the benefit of a similar adjustment. Even if the increase is insufficient to change House membership, it will nonetheless increase New York's share in the numerous revenue sharing plans that are tied into the census. The adversely affected States therefore fall within the category of parties who should be joined in the instant litigation if feasible.[21] Because compulsory joinder of all fifty States was not feasible in the district court, pragmatic equitable alternatives should have been considered.[22]

The first alternative, which the prior panel of this Court has already rejected, would have been to substitute Bureau and congressional review for that of the court.[23] This is the recommendation of the Association of the Bar's Special Committee on Empirical Data in Legal Decision Making which concludes its report with the following observation:

> The path to a better census is more likely to be found in scrutiny of Bureau procedures by the Bureau itself, Congress, other federal agencies, and interested professional groups than in litigation to compel adjustment.[24]

A second alternative would have been to require that notice of suit be given to all of the States, with permission

---

21 *Providence Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108 (1968).

22 *Id.* at 106-07.

23 The existence of half-a-hundred separately-sued legal challenges to the 1980 census, *see* note 10, *supra*, indicates that there may be a basic defect in the procedure for census review. If the courts cannot correct this situation, it may be wise for Congress to do so.

24 *See Undercount of the Census, supra* note 7, at 47.

to intervene given any State which felt that its interests were imperiled. Apparently, no notice was given anyone; only the County of Suffolk sought intervention, and its application was denied.

A third alternative would have been to seek multidistrict coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. It appears that thirty-one of the above listed actions have been transferred to the District of Maryland for coordinated or consolidated proceedings.[25] The wisdom vel non of adopting a uniform nationwide method of making statistical adjustments might perhaps be fully explored if complete multidistrict joinder were agreed upon.

As a fourth alternative, the district court could have stayed the operation of its judgment pending a definitive appellate ruling as to whether the Census Bureau's conduct of the 1980 census could properly be challenged in fifty separate and unrelated actions and whether the requirements imposed on the Bureau by the district court in this action were proper.[26]

Without passing on the wisdom or necessity of any of the foregoing alternatives, we conclude that, at the very least, the district court was required to conduct the trial in such a manner that the interests of other States and subordinate government bodies were not prejudiced by rulings that prevented a full and fair development of the facts. Because error and prejudice resulted from certain of the district court's discovery orders and the sanctions

---

25 *In re 1980 Decennial Census Adjustment Litigation*, 506 F. Supp. 648 (J.P.M.D.L. Jan. 16, 1981).

26 *See Providence Tradesmens Bank & Trust Co. v. Patterson, supra*, 390 U.S. at 115.

imposed in connection therewith, for this reason, if for no other, there must be a new trial.

As part of their pretrial discovery, plaintiffs requested disclosure of the Master Address Registers for New York City and every other municipality in the State, together with a listing of all the vacant housing units in every New York State municipality. The Master Address Registers contain information based upon interviews and questionnaires and include data as to householders, house members, street names, apartments or unit numbers, descriptions of location, numbers of units, numbers of persons, etc. The Census Bureau estimated that there are more than 550,000 pages of address registers for the New York region alone. The vacant housing forms, known as D-160 Unit Status Review forms, contain information as to the vacant or occupied status of a unit, as obtained from the owner, custodian, manager, a neighbor, or another individual with knowledge. Between 500,000 and 600,000 D-160 forms are estimated to exist for the New York region. The Bureau took the position that the requested information was confidential, that its disclosure would violate 13 U.S.C. § 9 and would undermine the public confidence needed for the effective conduct of the census.[27]

The district court directed the Bureau to produce the documents in question, the court's sole concession to the Bureau's claim of confidentiality being the grant of permission to redact "only" the names of persons residing in a household. The court ordered that any person granted access to the documents should be sworn to confidential-

---

[27] The Bureau did offer, however, to produce D-388 forms, which consisted of page-by-page summaries of all of the D-160 forms, including total housing units, vacant units, unclassified units and population counts on a block-by-block basis.

ity pursuant to 13 U.S.C. § 23(c).[28] Upon the Bureau's refusal to comply with the production order, the district court precluded the defendants from offering any evidence to prove "any fact, matter or circumstance that would be reflected in or could be derived from the [Master Address Registers or D-160 forms] or that could be contradicted or impeached by such documents." Defendants were also precluded from "denying or offering evidence or testimony to disprove" the following allegations in plaintiffs' complaint:

> (a) that there was a disproportionate undercounting of Blacks, Hispanics, other racial and ethnic minorities, legal and illegal aliens, persons whose principal language is other than English and persons living in poverty or high-crime urban areas;
>
> (b) that the persons above described live in New York State or New York City in substantially disproportionate numbers as compared to the nation as a whole; that therefore the undercount for New York will be substantially higher in percentage terms than it will be for the rest of the United States and in absolute numbers it will be larger than the undercount for any other State;
>
> (c) that the 1980 census operations in New York, and particularly in New York City, have been carried out in a manner that will greatly exacerbate the un-

---

28 Section 23(c) provides that the Secretary of Commerce may utilize a temporary staff to assist the Census Bureau in performing its work, but only if such temporary staff is sworn to observe the limitations imposed by 13 U.S.C. § 9. It would appear that if plaintiffs' attorneys are sworn to confidentiality pursuant to the provisions of this section, they will be in the enviable, but legally uncomfortable, position of becoming part of the Bureau's temporary staff.

dercount in New York as compared to other parts of the nation;

(d) that the particular difficulties encountered by the Census Bureau and the poor management of census operations in New York State, and especially New York City, have made judicial relief essential;

(e) that the Census Bureau with knowledge of the difficulties it would encounter in New York State and New York City and with knowledge that undercounting would be disproportionately severe there, especially among the class described in paragraph (a) above, knowingly and intentionally failed to devote adequate resources to develop special plans and procedures, to assign the most qualified personnel and to carry out their own planned procedures in New York State, and particularly New York City;

(f) that the first follow-up operations in New York State and New York City were also seriously mismanaged (Six paragraphs, covering four printed pages in the Appendix, set forth alleged examples of mismanagement under this general allegation of wrongdoing);

(g) that the second follow-up operations were not being adequately staffed or managed in New York; they were not designed to count additional households, correct inaccuracies in the size of households, or to recheck the casual count inaccuracies;

(h) that the local review program was being improperly conducted by an inadequate staff and the City had been given neither adequate time nor adequate information to review and challenge the results.

Looking first to the discovery order, we conclude that it was improvidently granted. In *McNichols v. Klutznick*, No. 80-2023 (10th Cir. April 17, 1981), one of the actions pending in other jurisdictions, the district court had granted the identical relief ordered by the court below. The Court of Appeals reversed, stating that "[b]oth the history of the Census Act and the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality."[29] Although the Third Circuit appears to have taken a contrary position,[30] we agree with the holding of the Tenth Circuit.

Assuming for the argument, however, that the court below did not err in granting discovery, it clearly abused its discretion in the imposition of sanctions. As already pointed out, New York is seeking to gain an advantage over other States in the competition for congressional seats and federal funds. The extremely broad sanction order punished these unrepresented States by preventing full and fair disclosure of the facts and an adjudication on the merits of plaintiffs' claims.[31] The severity of sanctions should be tempered by a consideration of the equities involved.[32] The equities in the instant case dic-

---

29 *McNichols v. Klutznick*, No. 80-2023, slip op. at 3-4 (10th Cir. April 17, 1981). See *Seymour v. Barabba*, 559 F.2d 806, 807-08 (D.C. Cir. 1977), where the court said that the provisions of section 9(a) are a "flat barrier to disclosure with no exercise of discretion permitted."

30 *Shapiro v. Klutznick*, No. 80-2466 (3d Cir. Dec. 1, 1980) (mem.), *cert. granted*, 49 U.S.L.W. 3799 (U.S. April 27, 1981) (No. 80-1436).

31 Because of the sweeping effect of the district court's sanction, we are not even told what New York City's census count was.

32 *Williams v. Krieger*, 61 F.R.D. 142, 145 (S.D.N.Y. 1973).

tated that the unrepresented States not be penalized because the Census Bureau was attempting to recognize the public's interest in a confidential census.

Reversed and remanded for further proceedings consistent with this opinion.

STEWART, *District Judge* (concurring in the judgment):

Although I concur in the judgment, I write to express my disagreement with the court's analysis in overturning the order of the district court that the follow-up address registers (FARs) and D-160 Unit Status Review forms be disclosed to the plaintiffs with limitations. I also consider the scope and the effect of the holding overturning the preclusion order.

I.

The statutory privilege raised by appellants as a barrier to disclosure is substantial and undoubtedly necessary. However, I do not believe that the statute under which the government claims an absolute privilege from disclosure is so broad as to protect most of the information sought by plaintiffs from the limited disclosure ordered below.[1]

[1] As there is no disagreement concerning the relevance of the information to appellees' case, I confine my discussion to the question of privilege. If the information sought is absolutely privileged, or if the information is qualifiedly privileged and the disclosure is not warranted, the discovery order must be reversed. If the information is not privileged, or if the qualified privilege is overcome, the discovery order must be upheld.

A.

The starting point in analyzing the scope of a statutory privilege must be the text of the statute, *see United States v. Missouri Pacific R.R. Co.*, 278 U.S. 269, 277-78 (1929), and the statute must be strictly construed. *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961). The defendants bear the burden of proving that a privilege exists. *Heathman v. United States District Court*, 503 F.2d 1032, 1033 (9th Cir. 1974) (citing 8 Wright & Miller, Federal Practice & Procedure: Civil, § 2016 at 126).

The statute in question provides:

> § 9. Information as confidential; exception
>
> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.
>
> No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual.

> Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence, or used for any purpose in any action, suit, or other judicial or administrative proceeding.

13 U.S.C. § 9(a) (1976). Appellants contend that the statute extends confidentiality to "all information or data provided to the Census Bureau under the Act." Appellants' Br. at 53-54.[2] The opinion of the court merely endorses the holding of the Court of Appeals for the Tenth Circuit that "the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality." Slip op., *supra,* at 11, *quoting McNichols v. Klutznick,* No. 80-2033, slip op. at 3-4 (10th Cir. March 17, 1981), *petition for cert. filed sub nom., McNichols v. Baldridge,* 49 U.S.L.W. 3826 (U.S. April 24, 1981) (No. 80-1781). The express terms of the statute are not so broad. Subsection 9(a)(1) limits the use of "information furnished under the provisions of this title" to statistical purposes. This provision recognizes the purpose of the census as merely gathering sociological data rather than enabling law enforcement or dictating substantive policy. Subsection 9(a)(2) protects the confidentiality of respondents in the enumerated population by prohibiting dissemination of information identified with "any particular establishment or individual" beyond offi-

---

2 Citations to the briefs of the parties will be recorded as "Appellants' Br. at . . .", "Appellees' Br. at . . .", and "Appellants' Reply Br. at . . . ." The Joint Appendix Volumes I-X are referred to by page number as "A. . . . ."

cers or agents of the Department of Commerce or the Bureau. This is also consistent with the benign, data gathering function of the census. Subsection 9(a)(3) is more restrictive than § 9(a)(2), limiting access to individual reports to "officers and employees of the Department or bureau." Thus, the express protection of the statute is circumscribed: (1) census information is to be used only for statistical purposes; (2) no one may publish information which identifies respondents; and (3) no one without statutory authority may peruse individual reports.

Moving beyond the language of § 9, its legislative history does not support appellants' all-embracing interpretation. Appellants identify as indicative of the "strong congressional intent against all disclosure" the swift reaction of Congress to the decision of the Supreme Court in *St. Regis Paper Co., supra.* Appellants' Br. at 51 n.*. The Court had decided that, as written, § 9 did not protect copies of census questionnaires voluntarily retained by respondents. 368 U.S. at 218. Within one year Congress adopted the flush language following § 9(a)(3)[3] to overrule *St. Regis Paper Co.* The legislative history pertaining to the amendment shows its limited purpose.

> The purpose of this legislation is to provide specifically that company-retained copies of census reports submitted to the Bureau of the Census shall have the same confidential status which is afforded to the original census reports . . . .

S.Rep. No. 2218, 87th Cong., 2d Sess. 2 (1962), *reprinted in* [1962] U.S. Code Cong. & Ad. News 3188, 3189. The Department of Commerce request for enactment of this

---

3 The text of the statute appears at pp. 1-2, *infra.*

measure stated that, with the requested amendment, " . . . a respondent will be free to give information to Census for statistical purposes only, without fear that a copy of the return can be demanded by a regulatory agency and used against the respondent." Letter from Secretary of Commerce Luther H. Hodges to President Lyndon B. Jonson, *reprinted in* [1962] U.S. Code Cong. & Ad. News 3190, 3191. The relationship between respondents and the Bureau is repeatedly emphasized in Secretary Hodges' letter. *Id.* The statutory response to *St. Regis Paper Co.* was thus confined to the narrow holding of the case.

Although the *St. Regis* Court was specifically concerned with the relative protection afforded census forms retained by respondents and those held by the Census Bureau, the Court stated that "the prohibitions against disclosure contained in § 9 . . . do not purport to generally clothe census information with secrecy." 368 U.S. at 217-18. The Court analyzed each of the three subsections of 13 U.S.C. § 9 in the same manner as I have done here. *Id.* at 215-16. The strict construction given to § 9 by the Supreme Court did not occasion any fundamental rethinking or clarification of the statute. The statute could have been amended to include a blanket prohibition on dissemination of the information obtained by the Bureau from any source, for any purpose. It was not so amended. In fact, the Committee on Post Office and Civil Service of the House of Representatives expressly rejected a statutory revision that would prevent use of "all copies of [census] information, reports and other data" in judicial and administrative proceedings. H.R. Rep. No. 2437, 87th Cong., 2d Sess. 1-2 (1962). *See also* H.R.Rep. No. 10569, 87th Cong., 2d Sess. (1962), printed in Hearing Before the Comm. on Post Office and

Civil Serv., Confidentiality of Census Reports, 87th Cong., 2d Sess. (1962).

The limitation of confidentiality to information furnished to the Bureau by census respondents was emphasized in an early predecessor to § 9 which authorized the Director of the Census to collect and publish statistics relating to cotton seed. *See* Act of Aug. 7, 1916, Pub.L. No. 64-177, ch. 274, § 2, 39 Stat. 436 (1916) ("1916 Act"). The 1916 Act provided "[t]hat the *information furnished by any individual establishment* under the provisions of this Act shall be considered as strictly confidential and shall be used only for the statistical purpose for which it is supplied." *Id.* (emphasis added).

I also derive support for this interpretation of § 9 from the express language of 13 U.S.C. § 8, a statute empowering the Secretary of Commerce to make certain disclosures subject to the limitations of § 9. Subsection 8(b) permits disclosure of tabulations or statistical materials "which do not disclose the information *reported by, or on behalf of, any particular respondent.*" *See McNichols v. Klutznick, supra,* slip op. at 5 (emphasis added), *petition for cert. filed sub nom., McNichols v. Baldridge,* 49 U.S.L.W. 3826. Subsection 8(b) is entirely consistent with § 9(a) in seeking to protect the identity of census respondents. Subsection 8(c) illustrates another means of protection for census respondents. The information furnished to any respondent or government unit under § 8 may not "be used to the detriment of any respondent or other person to whom such information relates." 13 U.S.C. § 8(c) (1976).

I can only conclude that the privilege conferred by § 9 is not as broad as the court's opinion states. Nonetheless, the express language of the statute amply protects the confidentiality interests of census respondents and pro-

motes the purposes of accurate enumeration of the population. *See In re FTC Corporate Patterns Report Litigation,* 432 F.Supp. 291, 305 (D.D.C. 1977), *aff'd sub nom. Appeal of FTC Line of Business Report Litigation,* 595 F.2d 685, 699 (D.C. Cir. 1978).

Broadening our search for the limits of the statutory privilege conferred by 13 U.S.C. § 9(a) to include judicial construction of the statute does not materially alter this picture of substantial, but finite, confidentiality. Defendants rely heavily on *Seymour v. Barabba,* 559 F.2d 806 (D.C.Cir. 1977) (per curiam), for the absolute confidentiality of matter gathered by the Bureau, whether or not the data is reported to the Bureau by census respondents. *Seymour* held that the Bureau did not have to disclose to third parties the names and addresses of companies falling within 21 of the Bureau's "standard industrial classifications." *Id.* at 809. The information was sought to notify potential class members of an antitrust suit. Plaintiff argued that the names and addresses were not furnished under the Census Act and were not gathered for statistical purposes. With respect to the latter point, the opinion reasoned that names and addresses are "sufficiently related to the statistical data which the firms eventually are called upon to report that it is protected under Section 9(a)(1)." *Id.* The statistical purpose of collecting names and addresses for standard industrial classifications is apparent: it permits cross-checking data to avoid double counting while ensuring completeness. To the extent that the *Seymour* Court found names and addresses could not be disclosed without violating the statutory proscription of use of "information furnished under this title" for other than statistical purposes, I agree with its holding. I cannot agree with *Seymour,* however, that information "gathered," "categorized and

assembled" for the Bureau, but not reported by census respondents, acquires statutory protection. My reading of the statute and its purpose, as described above, of ensuring respondents' privacy, leads to the conclusion that "information furnished under the provisions of this title" means information obtained from the enumerated population.

This latter construction was adopted by Judge Weinfeld in *United States v. Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958). Judge Weinfeld found that the "clear and unambiguous" purpose of the statute "was to protect [citizens] who complied with the command of the statute." *Id.* at 570. *United States v. Littles,* 321 F.Supp. 388 (D.Del. 1971), also focussed on the origin of the census data and its use, not merely on the Census Bureau as the repository of any information:

> . . . [T]he information obtained by the census questionnaire is strictly confidential. 13 U.S.C. § 9. It may not be used other than for statistical reporting, and may never be disclosed in any manner so as to identify any individual who has answered the questions.[4]

Id. at 392. In *Littles,* the court declined to dismiss an information charging the defendant with refusal to answer census questions. *Id.* The court relied on the statutory privilege protecting respondents' confidentiality in denying defendants' claim that the census questionnaire was an unconstitutional invasion of privacy.

---

4 *See also Doe v. McMillan,* 459 F.2d 1304, 1326 n.15 (D.C.Cir. 1972) (Skelly Wright, C.J. dissenting), *rev'd in part, aff'd in part, and remanded,* 412 U.S. 306 (1973) (Census Act "forbids public dissemination of information obtained by census takers").

B.

It remains to assess the discovery order in this case in light of the specific and limited provisions of 13 U.S.C. § 9(a). The discovery order provided:

> [T]hat [appellants] shall produce to [appellees] by September 10, 1980, the FARs for the City and State of New York for use in checking the accuracy of [appellants'] conduct of the 1980 decennial census except that as to those Census Bureau District Offices in New York State which have been closed or from which FARs have been removed by the Census Bureau, the FARs for those offices shall be produced to the [appellees] by September 12, 1980; and it is further
>
> ORDERED that [appellants] shall produce to [appellees] by September 10, 1980, for use in checking the accuracy of [appellants'] conduct of the 1980 decennial census:
>
> (a) all lists compiled by the Census Bureau of vacant or nonexistent household units in the City and State of New York; and
>
> (b) all Census Bureau D-160 forms for housing units in the City and State of New York other than those indicating that the household unit is occupied; and it is further
>
> ORDERED that [appellees] and their attorneys shall use the documents produced pursuant to this order solely for the purpose of helping to ensure an accurate count of the whole number of persons in New York in the 1980 decennial census, and such documents shall not be used or disclosed to any other

person for any other purpose whatsoever; and it is further

ORDERED that any person granted access to the documents produced pursuant to this Order shall be sworn to confidentiality pursuant to 13 U.S.C. § 23(c); and it is further

ORDERED that in producing the documents required herein, [appellants] may redact such documents to remove from them only the names of persons residing in any household enumerated in the 1980 decennial census; and it is further

ORDERED that [appellants'] motion for a protective order is granted to the extent provided herein, and is in all other respects denied; . . . .

A.281-83.

I turn first to the FARs. The FARs at issue were completed in six steps. First, addresses were purchased from the commercial mailing firms "that supplied the best list for the area." A.437. That included 2,279,000 addresses. A.449. Second, because the commercial lists ("TARs") were known to be deficient, the TARs were compared to the 1970 census address list and 255,000 addresses were added. A.437, 449. Third, the addresses were printed on post cards and checked by the Post Office for address correction, duplication, business only, undeliverables and address missing. A.437. This added 458,000 addresses. A.449. Fourth, in a "precanvass" operation, enumerators checked the special address registers in the field to verify the accuracy of addresses, to identify missing units and to correct geographic errors. A.437. Precanvass added an additional 219,000 addresses to the master mailing lists. A.449. Fifth, another round of

postal checks followed. A.437. Sixth, the FARs were up-dated after questionnaires were mailed out and either mailed back or answered by a personal visit or answered by the enumerators if no response was obtained. A.266-267.

It follows from the foregoing analysis of the statutory privilege that information obtained at the first, third, fourth and fifth steps is not privileged.[5] Most importantly, the information sought at these steps was not supplied by census respondents. It is also significant that the information was to be used only for statistical purposes—according to appellees' representations, A.270, and the express terms of the discovery order, A.282. There was no dissemination of information that identified any respondent. The names of persons residing in any enumerated household were to be redacted. A.282-83. There was no evidence that the respondent was otherwise identified on the address registers. Appellees did not seek and the district court did not grant access to individual reports. Also, under the protective aspects of the order, persons granted access to the documents were ordered not to disclose or use the FARs "for any other purpose whatsoever," and were sworn to confidentiality.

At the second and sixth steps, however, the statutory privilege may apply, as information furnished by respondents is sought. However, the statutory privilege is not absolute. The information furnished by respondents may be disclosed for statistical purposes as long as respon-

---

[5] Indeed, it would be far-reaching to assert a privacy interest in an address that is voluntarily disclosed to the post office or a retail establishment and which is utilized to receive mail. Privacy protection does not extend to information that a person voluntarily and knowingly exposes to the public. *See, e.g., Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 455-59, 465 (1977); *United States v. Miller*, 425 U.S. 435, 442 (1976); *Katz v. United States*, 389 U.S. 347, 351 (1967).

dents are not identified and the individual reports are not disclosed. *See* text at app. 2-5, *supra*. So "[t]he potential harm from disclosure of any communication subject to a privilege must be weighed against the benefits of disclosure." *Carr v. Monroe Mfg. Co.*, 431 F.2d 384, 390 (5th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); *see United States v. IBM*, 1975-2 Trade Cases, ¶ 60,383 (S.D.N.Y. 1975). It is appropriate in determining the availability of a privilege to consider protective orders tailored to the case at hand. *Carr*, 431 F.2d at 390, *cert. denied*, 400 U.S. 1000. The district court heard argument and considered counsel's submissions before ordering disclosure. The disclosure order recited the competing considerations. The order was crafted to satisfy both the letter and intent of § 9(a). The information was sought only for statistical purposes and the disclosure order prohibited dissemination of information identifying census respondents. Access to the individual reports was never at issue. It was not an abuse of discretion to comply fully with the statutory privilege and order the FARs produced subject to a protective order.

In reviewing the disclosure order of the district court relative to the D-160s "other than those indicating that the household unit is occupied," we first determine what data is contained in D-160s. In addition to the address and vacant condition of the unit, D-160s specify the name of the person providing the information. A.320. This information is supplied by both census employees and respondents who are not residents of the vacant units. The protective order only permitted the Bureau to redact from the documents the names of residents of enumerated households. As disclosure of the D-160s would identify the individual respondents, who may not be census employees, such disclosure would violate § 9(a)(2)

as construed above. As the disclosure order with respect to the D-160s inadequately protected the confidentiality of census respondents the order was erroneous.

I conclude that 13 U.S.C. § 9 is not as broad as claimed by appellants, but that it does reach some matter ordered disclosed by the district court.

II.

Following the discovery order, the Census Bureau persisted in its claim of privilege. The district court certified its disclosure order to this court and stayed the production order. Following the October 1, 1980 order by this court denying review, appellees sought a preclusion order under Fed.R.Civ.P. 37(b)(2) for appellants' failure to comply with the disclosure order.

Our review is limited, of course, to determining whether the preclusion order was an abuse of discretion. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976) (per curiam). There are several novel considerations in issuing sanctions against government officials for failure to permit discovery: (1) the significance of an abuse of discretion is magnified by the importance of the issue and the status of the noncomplying party; and, (2) issue-related sanctions are ordinarily sufficient. *See In re Attorney General of the United States*, 596 F.2d 58, 65 (2d Cir. 1979). As the opinion of the court emphasizes, the unique nature of this case bears out the importance of limited and necessary sanctions. Nonetheless, the district court found that a preclusion order was appropriate in light of appellants' "knowing and wilful" noncompliance with the discovery order. There is no contention, however, that appellants' reticence was a matter of bad faith, and the district court did not so find.

I agree with the rest of the panel that the preclusion order was overly broad. First, there was ample evidence already made available by appellants that contained essentially the same information as contained in the FARs. The Bureau was producing Form 388s, which contained the total population and housing unit figures from the address registers for each enumeration district. A.352. The 388s also provide totals of vacant housing units. *Id.* Second, the order effectively determined several issues despite contrary evidence not derived from the FARs or D-160s. For example, there was independent evidence that the undercount in rural areas was greater than the undercount in urban areas, A.635, that could not be offered at trial to rebut the plaintiff's case as a result of the preclusion order. This was a matter of historical fact unrelated to issues of the present undercount in New York and the claims of mismanagement, but tending to disprove appellees' claim. Third, the FARs and D-160s were not necessary to prove several of the claims that were included in the preclusion order. Paragraphs 47(a) and 47(b) of the complaint, for example, allege that inadequate staffing and procedures constituted mismanagement that exacerbated the undercount. The extent of the staffing and the adequacy of procedures are not proved or disproved by anything in the FARs or D-160s.

The court's opinion implies that the district court did not adequately consider the interests of other states as claimants to both the representational and budgetary pies. Clearly the case requires consideration of the interests of other states. But this appeal concerns primarily the issue whether the decision concerning discovery and the subsequent preclusion order as a sanction for failure to permit court ordered discovery was tailored to the facts of the case. I do not agree with the court's opinion that

"[t]he question presented by litigation such as the one now before us is whether one state can be granted such an increase [in congressional representation] without full consideration having been given to the effect on other states." Slip op., at 6. The interests of other states are not, strictly speaking, implicated until different types of relief are being considered, although a decision on the merits regarding both the claimed undercount and mismanagement is highly desirable. From a practical standpoint, I am not at all sure whether the court's opinion proposes to consider other states' interests in a manner that is any different from the adopted course of the district court. The entire panel apparently believes that it is possible to conduct the trial in this case, even though only one state is involved, so long as there is no prejudice to the rights of others. The district court order provided that any appropriate relief should be formulated by the Census Bureau in a manner that safeguards the absent interested parties. A.41-42. The Bureau, and not the district court, must initially bear the responsibility of formulating equitable relief if such relief is warranted.

III.

In sum, I find the express language of 13 U.S.C. § 9(a), as well as its legislative history and case interpretation, to support a narrower privilege than that advanced by the appellant and accepted by the majority. However, the district court's disclosure order did not meet the command of the statute. I also find that the preclusion order was not tailored to the conduct or information at issue. Accordingly, I concur in the judgment.

Appendix J

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 10th day of September, one thousand nine hundred and eighty-one.

HUGH L. CAREY, EDWARD KOCH, ALAN CHOU, ROSE L. DAWSON, SAMUEL LEFKOWITZ, MICHAEL LOIZOU, EDWIN MARTINEZ, WALTER E. MARX, BRUNILDA PACHECO, LAMUEL STANISLAUS, STATE OF NEW YORK, and CITY OF NEW YORK,
Plaintiffs-Appellees,

—v—

PHILIP M. KLUTZNICK, Secretary of Commerce, VINCENT BARABBA, Director, Bureau of the Census, WILLIAM F. HILL, Regional Director, New York Region, Bureau of the Census, RICHARD BITZER, Acting Assistant Regional Director, New York Region, Bureau of the Census, ARTHUR G. DUKAKIS, Regional Director, Boston Region, Bureau of the Census, UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, JIMMY CARTER, President of the United States, EDMUND J. HENSHAW, JR., Clerk of the United States House of Representatives,
Defendants-Appellants.

No. 81-6042

A petition for rehearing having been filed herein by counsel for the defendants-appellants and a petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for plaintiffs-appellees,

Upon consideration by the panel that heard the appeal, it is ORDERED that the said petitions for rehearing are DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. DANIEL FUSARO

A; Daniel Fusaro
Clerk

By /s/ FRANCIS X. GINDHART

Chief Deputy Clerk

Appendix K

SUPREME COURT OF THE UNITED STATES

No. A-567

Philip M. Klutznick, Secretary of Commerce, et al, Applicants,
v.
Hugh L. Carey et al.

On Application for Stay.

[December 30, 1980]

The application of the Solicitor General for a stay pending appeal to the United States Court of Appeals for the Second Circuit was presented to JUSTICE MARSHALL as Circuit Justice, and by him referred to the Court. The application was directed to that portion of the judgment entered December 29, 1980, by the United States District Court for the Southern District of New York, case No. 80 Civ. 4550, that precludes the Bureau of the Census from certifying to the President the population totals for New York and the state-by-state census tabulations, on December 31, 1980, as mandated by 13 U. S. C. § 141 (b). The application is hereby granted. This order shall remain in effect pending disposition of the appeal by the Court of Appeals.

JUSTICE STEVENS took no part in the consideration or decision of this application.

JUSTICE MARSHALL, dissenting.

In this case, the Government seeks a stay pending appeal, of an Order of the United States District Court for the Southern District of New York, enjoining the Census Bureau from certifying the official tabulation of New York State's population to the President as required by 13 U. S. C. § 141 (b). Respondents include the City of New York and its Mayor; the Governor of the State; and several voters and taxpayers in various city, congressional, state senatorial and

assembly districts who filed suit in District Court alleging that the 1980 census was conducted in a manner that will inevitably result in an undercount, largely in low-income areas populated by members of minority groups. Specifically, respondents alleged that the master address registers used by the Census Bureau were grossly inadequate and that the follow-up check of the master address registers by postal service and census workers was grossly inadequate. Respondents' ultimate contentions were that the resulting undercount not only will cause New York to lose at least one congressional seat to which it is entitled when reapportionment is made pursuant to the 1980 census, but that it will also result in the dilution of the votes of New York residents vis-a-vis those of residents of other States, and will cost New York City and the State vast sums of money distributed under federal revenue sharing and other programs with statutory formulas tied to the census.

The District Court initially entered a preliminary injunction against the Census Bureau: It found that respondents had established a clear possibility of irreparable harm to the efficacy of their votes, and that respondents were likely to succeed because they had submitted significant evidence concerning Census Bureau mismanagement and had raised serious questions as to whether some of the Bureau's policies and procedures were carried out in an arbitrary and irrational manner. The District Court declined to stay the preliminary injunction, and on appeal, the Court of Appeals for the Second Circuit affirmed the District Court's denial of a stay. The Court of Appeals found that respondents had demonstrated a possibility of irreparable harm and had also shown sufficient prospect of success on the merits to justify a preliminary injunction, and that the District Court did not disregard traditional equitable principles in issuing the preliminary injunction.

On December 22, 1980, the District Court entered final judgment in favor of respondents. The court found that the Bureau's implementation of the census was improper in several respects and that the Bureau's mismanagement of the

census had resulted in a significant undercount in New York. The District Court ordered the Bureau to adjust the actual census data regarding New York in a reasonable and scientific manner to compensate for the disproportionate undercount, and it enjoined the Bureau from certifying New York's population totals to the President on December 31, 1980, as required by statute. The Government then brought this stay application.

Most of the Government's memorandum in support of its stay application is devoted to arguing that the respondents are unlikely to succeed on the merits of the case.* On the sparse record before this Court, I am not prepared to conclude that respondents cannot prevail on the merits. The Court of Appeals rejected the Government's claim that respondents cannot prevail on the merits and as noted, the District Court has ruled against the Government as has at least one other District Court. For me, the crucial issue in ruling on this application is the Government's inability to show that there is a substantial likelihood that it will suffer irreparable harm if a stay is not issued. The only thing the Government points to is that the Census Bureau will be unable to comply with the December 31 deadline if the District Court's Order is not stayed. But as the Court of Appeals pointed out, there is nothing sacrosant about the December 31 deadline. If the District Court's conclusion is correct, the inability to meet the deadline is the Bureau's own fault. Moreover, the actual reapportionment of seats based on the 1980 census will not commence until some later date and there is nothing about the District Court's Order that prevents this

*The Government also relies on JUSTICE STEWART's stay of the District Court's decision in *Young* v. *Klutznick* 497 F. Supp. 1318 (ED Mich.) (1980). In that case, the District Court enjoined the Census Bureau from certifying population totals for *any* States by December 31, 1980. But in this case, unlike in *Young*, the District Court order *only* applies to *New York's* population totals. Thus, the Government cannot rely on the alleged interest of various States in using the census figures for redistricting purposes for state legislatures.

reapportionment from taking place well in advance of the 1982 congressional elections.

The Government's failure to prove irreparable harm from denial of its stay application stands in marked contrast to the irreparable harm that will be inflicted on respondents if the Census Bureau is allowed to certify inaccurate (at least according to the District Court) results to the President. The Government has not suggested that there is any procedure for correcting these "inaccurate" figures once they are reported to the President and he transmits them to Congress as required by statute, and these figures will presumably be the basis for the reapportionment of congressional seats and a variety of federal revenue grants. The members of minority groups and other residents of low-income areas who were not counted by the Census Bureau will therefore suffer the irreparable injury stemming from the undercount. Thus, it appears that granting the Government's application not only fails to preserve the status quo, it may actually moot the underlying controversy. In these circumstances, I cannot agree that a stay must issue.

Opposition

FILED
JAN 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-752

In the Supreme Court of the United States

OCTOBER TERM, 1981

HUGH L. CAREY, ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

WILLIAM KANTER
MICHAEL JAY SINGER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether lists of addresses collected and utilized by the Bureau of the Census in fulfilling its duties under the Census Act, 13 U.S.C. (& Supp. IV) 1 *et seq.*, are privileged from disclosure in civil discovery.

2. Whether, in the circumstances of this case, the district court abused its discretion in issuing a broad preclusion order pursuant to Fed. R. Civ. P. 37(b)(2).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and rules involved	2
Statement	4
Argument	11
Conclusion	14

TABLE OF AUTHORITIES

Case:

McNichols v. *Klutznick*, 644 F.2d 844, cert. granted *sub nom. McNichols* v. *Baldrige*, No. 80-1781 (June 15, 1981) 10, 11, 14

Constitution, statutes and rules:

United States Constitution:

Article I, Section 2, Clause 3 4
Fourteenth Amendment, Section 2 4

Census Act, 13 U.S.C. (& Supp. IV) 1 *et seq.* 11

Section 8(b), 13 U.S.C. 8(b) 2
Section 9, 13 U.S.C. 9 ..... 9, 12
Section 9(a), 13 U.S.C. 9(a) 2, 7
Section 131, 13 U.S.C. 131 5
Section 141(a), 13 U.S.C. 141(a) 4
Section 141(b), 13 U.S.C. 141(b) 5, 9
Section 141(c), 13 U.S.C. 141(c) 5
Section 142, 13 U.S.C. 142 5
Section 161, 13 U.S.C. 161 5
Section 195, 13 U.S.C. 195 5

Constitution, statutes and rules—Continued Page

Freedom of Information Act, 5 U.S.C. 552 10
Fed. R. Civ. P.:
Rule 26(b)(1) 2
Rule 37 8
Rule 37(b)(2) 3

Miscellaneous:

J. Passel, J. Siegel & J. Robinson, *Coverage of the National Population by Age, Sex, and Race in the 1980 Census: Preliminary Estimates by Demographic Analysis* (U.S. Bureau of the Census, November 1981) 14

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-752

HUGH L. CAREY, ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals reversing the district court's judgment and remanding for a new trial (Pet. App. I) is reported at 653 F.2d 732. An earlier opinion of the court of appeals affirming the district court's preliminary injunction (Pet. App. H) is reported at 637 F.2d 834. The opinions of the district court (Pet. Apps. B, C and D) are reported at 508 F. Supp. 404, 416 and 420.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1981. Cross-petitions for rehearing were denied on September 10, 1981 (Pet. App. J). The

petition for a writ of certiorari was filed on October 20, 1981. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

Section 8(b) of the Census Act, 13 U.S.C. 8(b), provides in pertinent part:

> Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary [of Commerce] may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent * * *.

Section 9(a) of the Census Act, 13 U.S.C. 9(a), provides in pertinent part:

> Neither the Secretary [of Commerce], nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

* * * * *

* Rule 26(b)(1) of the Federal Rules of Civil Procedure provides:

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 37(b)(2) of the Federal Rules of Civil Procedure provides in pertinent part:

> If a party * * * fails to obey an order to provide or permit discovery, * * * the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> > (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
> >
> > (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him

from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination * * *.

STATEMENT

1. Article I, Section 2, Clause 3 of the Constitution provides that an "actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as [Congress] shall by Law direct." The Fourteenth Amendment, Section 2, provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State * * *." These provisions require that a national census be taken every ten years and that Representatives be apportioned among the states based on the results of this decennial census.

Congress has provided in the Census Act for a decennial census and has delegated this function to the Secretary of Commerce, to be accomplished "in such form and content as he may determine * * *." 13 U.S.C. 141(a). The Secretary, in turn, has charged the Bureau of the Census with responsibility for this task. Apart from the decennial census, the

Census Act requires the compilation of censuses on a wide variety of subjects. See, *e.g.*, 13 U.S.C. 131 (business); 13 U.S.C. 142 (agriculture); 13 U.S.C. 161 (local governments). The Act allows the use of "sampling" techniques when deemed feasible in conducting these censuses, but sampling may not be used in determining the population for purposes of apportionment of Representatives. See 13 U.S.C. 195. In addition, the Act requires the submission to the President of total population figures for the states, for congressional apportionment purposes, within nine months after the census date; the census date is designated as April 1 of the decennial census year. See 13 U.S.C. 141(b). The Act further requires the Census Bureau to complete its population tabulations at sub-state levels within one year after the census date. See 13 U.S.C. 141(c). In the case of the 1980 Decennial Census, the census date was April 1, 1980, the statutory deadline for statewide population totals was December 31, 1980, and the statutory deadline for sub-state population totals was April 1, 1981.

2. In August 1980, petitioners—the Governor of the State of New York, the Mayor of New York City, the State and City of New York, and several New York residents—instituted this suit for declaratory and injunctive relief in the United States District Court for the Southern District of New York, challenging the conduct and results of the 1980 Decennial Census as it related to New York.[1] Specifically, petitioners alleged that: (1) the census was poorly managed in New York City and State (C.A. App. 62-

[1] The complaint named as defendants the Department of Commerce, the Census Bureau, the President, the Secretary of Commerce, the Director of the Census Bureau and other Bureau officials, and the Clerk of the House of Representatives.

81);[2] (2) a disproportionate undercount would occur in urban areas with large minority populations (C.A. App. 81-85); (3) the disproportionate undercount would result in malapportionment of congressional and state legislative seats within the State because of reliance on federal census figures in the intrastate redistricting process (C.A. App. 85-87); and (4) the undercount would result in decreased federal funds for the State (C.A. App. 87-88). Petitioners sought correction of the census count resulting from the alleged mismanagement, followed by a statistical adjustment of the upwardly revised population totals to compensate for the alleged disproportionate undercount (C.A. App. 88-89).

Respondents moved to dismiss the complaint on several grounds, including failure to state a claim on which relief may be granted, lack of standing, lack of ripeness, and nonjusticiability (Pet. App. B-3). Respondents also moved for partial summary judgment on the rationality of the Census Bureau's procedures and conduct; petitioners cross-moved for partial summary judgment on the question whether the Bureau has the authority to make a statistical adjustment of the population totals used for apportioning Representatives among the states (*ibid.*). On October 1, 1980, the district court denied respondents' dismissal and partial summary judgment motions and granted petitioners' cross-motion for partial summary judgment on the Bureau's authority to make a statistical adjustment (*id.* at B-5 to B-19).

---

[2] "C.A. App." refers to the joint appendix in the court of appeals. The joint appendix is comprised of twelve volumes numbering 3,936 pages. In addition, the parties filed in the court of appeals a joint appendix of exhibits also comprised of twelve volumes and numbering 5,601 pages.

Thereafter, on October 10, 1980, the district court granted petitioners' motion for preliminary injunctive relief (Pet. App. C). In particular, the court required the Bureau: (1) to continue to accept and process "Were You Counted" forms beyond the deadline; and (2) to accept for purposes of checking against the Bureau's own records certain unspecified computer tapes containing the names and addresses of allegedly hard-to-enumerate New York residents and to include any missed persons in the official census count (*id.* at C-3, C-8).

The court of appeals affirmed the granting of preliminary injunctive relief (Pet. App. H), rejecting respondents' arguments that petitioners failed to establish sufficent injury to warrant such extraordinary relief (*id.* at H-5 to H-6), that petitioners lacked standing to sue and that petitioners' claims were, in any event, nonjusticiable (*id.* at H-7 to H-10).

3. In the meantime, petitioners had requested the district court to issue a discovery order directing the Census Bureau to produce certain address registers and documents (D-160 forms) listing vacant dwelling units (Pet. App. F-1). The Bureau resisted disclosure, asserting an absolute statutory privilege under 13 U.S.C. 9(a) (Pet. App. F-2). On September 11, 1980, the district court ordered production of these documents. Respondents then sought to take an interlocutory appeal and petitioned for a writ of mandamus to challenge the discovery order; the court of appeals, however, dismissed both the appeal and the petition for mandamus (C.A. App. 1436-1438). The court of appeals also denied respondents' petition for rehearing and their application for a further stay of the discovery order (C.A. App. 3919).

Because of its strong commitment to maintaining the confidentiality of these documents, the Census Bureau continued to decline production of the address registers and vacancy lists. The Bureau's Director submitted to the district court an affidavit explaining the incalculable damage that would be wrought by disclosure (C.A. App. 319-321). The district court nevertheless held the Bureau in contempt for its refusal to comply with discovery. Pursuant to Fed. R. Civ. P. 37, the court issued a broad preclusion order (Pet. App. G) barring respondents from offering any evidence or testimony concerning matters reflected in the withheld documents, matters contained in several paragraphs of the complaint, and matters relating to any delay caused by the Bureau's failure to make discovery (*id.* at G-2). The action went to trial in November 1980 (Pet. App. D-2), but the proceedings were hampered and truncated by the preclusion order's limitation on respondents' evidentiary presentation of their case (*id.* at D-23).

4. On December 22, 1980, the district court issued its post-trial decision (Pet. App. D). The court found that "the overall methodology for the 1980 decennial census was reasonable" (*id.* at D-19), but that its implementation in New York "was on the whole unreasonable and at times irrational" (*id.* at D-20). In finding that New York was subjected to a disproportionate undercount (*id.* at D-22), the district court indicated that, although New York had established only a *prima facie* case in this regard, respondents were precluded from rebutting that case (*id.* at D-23). In addition, the court held that the Bureau was required to perform a valid statistical adjustment of New York's population totals for inclusion in the official census tabulations (*id.* at D-23, D-25).

Finally, the court ruled that the December 31, 1980, statutory deadline for reporting statewide population totals to the President for apportioning Representatives among the states, 13 U.S.C. 141(b), was merely directory rather than mandatory and would be set aside (Pet. App. D-24).

In its final judgment, entered on December 30, 1980, the district court: (1) declared that statistical adjustment of census figures to correct for a differential undercount is constitutionally permissible; (2) declared that the December 31, 1980, statutory deadline was not mandatory; (3) ordered the Census Bureau to adjust its 1980 census figures for New York; (4) ordered the Bureau to file within 30 days a plan for effectuating this judgment; (5) enjoined the Bureau from certifying New York population totals to the President by December 31, 1980; and (6) retained jurisdiction over the case to ensure compliance (Pet. App. E).

Respondents immediately filed a notice of appeal and applied to this Court for a stay of the district court's judgment insofar as it enjoined the reporting of statewide population totals to the President by December 31, 1980. On December 30, 1980, this Court granted the requested stay (Pet. App. K; 449 U.S. 1068). Thus, the statewide population totals were reported to the President within the statutory deadline prescribed by 13 U.S.C. 141(b).

5. On appeal, the court of appeals reversed the district court's judgment and remanded the case for further proceedings (Pet. App. I). The court held that the discovery order was erroneous as a matter of law because the withheld census documents were entitled to an absolute statutory privilege under 13 U.S.C. 9 (Pet. App. I-15). In reaching this conclusion, the court of appeals expressly endorsed the

reasoning of the Tenth Circuit in *McNichols* v. *Klutznick*, 644 F.2d 844 (1981), cert. granted *sub nom. McNichols* v. *Baldrige*, No. 80-1781 (June 15, 1981), a census case involving discovery of the same kinds of documents involved here. The *McNichols* case has already been argued and is awaiting decision in this Court, together with *Baldrige* v. *Shapiro*, No. 80-1436, which involves a related issue under the Freedom of Information Act, 5 U.S.C. 552.[3]

As an alternative ground for its ruling, the court of appeals held that the district court "clearly abused its discretion in the imposition of sanctions" (Pet. App. I-15). Because award of the relief sought by petitioners—upward adjustment of its population totals—would necessarily affect the relative population standing of other states, the "extremely broad sanction order punished these unrepresented States by preventing full and fair disclosure of the facts and an adjudication on the merits of [petitioners'] claims" (*ibid.*; footnote omitted). Thus, the court of appeals concluded that the harshness of the sanctions should have been "tempered by a consideration of the equities involved" (*ibid.*; footnote omitted), which in this case required that "the unrepresented States not be penalized because the Census Bureau was attempting to recognize the public's interest in a confidential census" (*id.* at I-16).[4]

---

[3] We note that at the time the instant petition was filed, petitioners requested this Court to set an expedited briefing schedule in this case and to consolidate the case for argument with *McNichols* and *Shapiro*. The Court denied petitioners' motion on November 2, 1981.

[4] District Judge Stewart concurred in the judgment (Pet. App. I-16 to I-30). In his view, not all of the census informa-

ARGUMENT

1. The court of appeals correctly decided that the census documents withheld from disclosure during civil discovery in this case were privileged under the Census Act, 13 U.S.C. (& Supp. IV) 1 *et seq.* This issue is currently awaiting decision by this Court in *McNichols* v. *Baldrige*, No. 80-1781. Accordingly, the Court may wish to defer disposition of the instant petition pending its decision in *McNichols*.

Regardless of the outcome of the discovery issue, the court of appeals' decision reversing the district court's judgment is correct. In its alternative holding, the court of appeals unanimously concluded that, even if the census materials sought by petitioners were discoverable, the district court nevertheless abused its discretion in imposing overly broad sanctions upon respondents for failing to comply with the discovery order (Pet. App. I-15 to I-16; *id.* at I-28 to I-30). Because this alternative holding is tied to the particular circumstances of this case, it does not warrant review by this Court.

2. Petitioners' contention that other issues raised in the course of this litigation warrant review at this

---

tion sought by petitioners was absolutely privileged from disclosure under the confidentiality provisions of the Census Act (*id.* at I-16 to I-28). However, Judge Stewart agreed with the other judges on the panel that the district court's preclusion order was overly broad (*id.* at I-28 to I-30).

Respondents petitioned the court of appeals for rehearing because the court had remanded the case for a new trial without addressing the proper standard of judicial review to be applied on retrial. Petitioners filed a cross-petition for rehearing with a suggestion for rehearing en banc, raising all of the issues presented in their petition for certiorari. The court of appeals denied both petitions for rehearing (Pet. App. J).

time is premised on a misreading of the court of appeals' decision. Petitioners argue (Pet. 3-4, 11-12, 20-21) that the court of appeals has ruled, in effect, that no action challenging the Census Bureau's conduct of the decennial census can be maintained. Although the court of appeals did recognize that substantial difficulties may be encountered in a suit of this kind, the court clearly did not foreclose further litigation in this case. Indeed, the court specifically held that it was bound by earlier rulings of a different panel to the effect that petitioners have standing to sue and that the issue of census mismanagement is justiciable (Pet. App. I-9 & n.18, I-10).[5] And the court explicitly stated that "there must be a new trial" (*id.* at I-12)—a curious requirement if further litigation were meant to have been foreclosed.

The court of appeals did not pass upon all of the broad issues sought to be raised in the petition (see Pet. i, 14-15), and specifically did not hold that a challenge to the conduct of the census is not justiciable. Rather, the court held that the discovery order "was improvidently granted" because the census documents sought by petitioners were statutorily privileged under 13 U.S.C. 9, and that, in any event, the district court "clearly abused its discretion in the imposition of sanctions" (Pet. App. I-15). The court of appeals therefore remanded this case for a new trial unencumbered by the broad preclusion order "that prevented a full and fair development of the facts" (*id.* at I-11). Thus, it is clear that petitioners' attempt to have this Court pass upon their broad claims should be rejected.

---

[5] We, of course, do not concede the correctness of these rulings on standing and justiciability.

Petitioners, in effect, are seeking review of these issues by certiorari before judgment—indeed, even before final judgment in the district court. Following the proceedings on remand, petitioners will be able to raise their claims, to the extent they remain in the case, on appeal from any judgment entered against them. In these circumstances, review by this Court of the issues presented by petitioners that are unrelated to the court of appeals' discovery rulings is not warranted.[6]

---

[6] Although we have already shown that the petition is without merit and would ordinarily conclude our discussion at this point, petitioners' misleading and inaccurate rendition of "the facts" of this case requires further comment. To the extent that petitioners rely on the findings of the district court, we note that the trial court's broad preclusion order prevented respondents from introducing considerable evidence to present the government's side of the case. As the court of appeals observed, these erroneous and harsh sanctions "prevented a full and fair development of the facts" (Pet. App. I-11).

Beyond this misplaced reliance on the district court's findings, however, petitioners make numerous other factual assertions without support in the record. For example, petitioners state (Pet. 5) that the Census Bureau's own studies indicate a net overcount of Whites "caused by erroneous double counting often related to affluence (*e.g.*, country homes; children away at school or college);" petitioners then describe a "miss" rate for Black males and females, and cite to a document that would appear to be an official Census Bureau publication. The impression left by these representations is that the cited document supports both of petitioners' factual assertions. In point of fact, however, the cited document—"Issues in Adjusting for the 1980 Census Undercount"—is not a Census Bureau publication at all, but rather an independent paper prepared by a Bureau employee and a university professor for presentation at a lecture in Detroit, Michigan. Moreover, the cited page of that paper (page 24) consists of a table reflecting preliminary

CONCLUSION

The petition for a writ of certiorari should be held for disposition in light of *McNichols* v. *Baldrige*, No. 80-1781.

Respectfully submitted.

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
WILLIAM KANTER
MICHAEL JAY SINGER
Attorneys

JANUARY 1982

---

estimates of an undercount rate for Black males and females, but contains nothing whatever relating to Bureau studies on a net overcount of Whites. Indeed, nothing in the report mentions any such Bureau studies. And the only Bureau study referred to on the cited page (as the source for the table) actually contradicts petitioners' representations concerning a White overcount relating to affluence. See J. Passel, J. Siegel & J. Robinson, *Coverage of the National Population by Age, Sex, and Race in the 1980 Census: Preliminary Estimates by Demographic Analysis* 4 (U.S. Bureau of the Census, November 1981) (estimated overcounts probably result from counting substantial numbers of illegal aliens). Thus, we are left with no support for petitioners' bald assertion of a White overcount relating to affluence.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 365103 771

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
FEB 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-752

IN THE
Supreme Court of the United States
October Term, 1981

HUGH L. CAREY, EDWARD I. KOCH, ALAN CHOU, ROSE L. DAWSON, SHMUEL LEFKOWITZ, MICHAEL LOIZOU, EDWIN MARTINEZ, WALTER E. MARX, BRUNILDA PACHECO, LAMUEL STANISLAUS, THE STATE OF NEW YORK, AND THE CITY OF NEW YORK,

Petitioners,

—against—

MALCOLM BALDRIGE, Secretary of Commerce, BRUCE CHAPMAN, Director, Bureau of the Census, WILLIAM F. HILL, Regional Director, New York Region, Bureau of the Census, RICHARD BITZER, Acting Assistant Regional Director, New York Region, Bureau of the Census, ARTHUR G. DUKAKIS, Regional Director, Boston Region, Bureau of the Census, UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, RONALD REAGAN, President of the United States, EDMUND L. HENSHAW, JR. Clerk of the United States House of Representatives,

Respondents.

REPLY BRIEF OF PETITIONERS

(List of Counsel on inside cover)

February 1, 1982

ROBERT S. RIFKIND,
CRAVATH, SWAINE & MOORE
Attorneys for all petitioners except Hugh L. Carey and the State of New York
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000

DAVID A. BARRETT
JOHN A. REDMON
ALAN R. GLICKMAN

ROBERT ABRAMS
Attorney General of The State of New York
Attorney for Hugh L. Carey and The State of New York
Two World Trade Center
New York, N.Y. 10047
(212) 488-7511

PETER BIENSTOCK
DANIEL BERGER

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of The City of New York
Attorney for The City of New York and Edward I. Koch
100 Church Street
New York, N.Y. 10007
(212) 566-3300

MARY MCCORRY

Of Counsel

TABLE OF AUTHORITIES

	Page
CASES:	
McNichols v. Klutznick, 644 F.2d 844 (10th Cir. 1981), *cert. granted sub nom. McNichols v. Baldrige*, 49 U.S.L.W. 3931 (U.S. June 15, 1981) (No. 80-1781)	5, 6, 8
St. Regis Paper Co. v. United States, 368 U.S. 208 (1961)	6
Wesberry v. Sanders, 376 U.S. 1 (1964)	3
Young v. Klutznick, 652 F.2d 617 (6th Cir. 1981), *petition for cert. filed sub nom. Young v. Baldrige*, (No. 81-867)	2, 3, 4, 5
STATUTES:	
13 U.S.C. §9	5, 7
13 U.S.C. §23	6
OTHER AUTHORITIES:	
New York Final Population and Housing Unit Counts, PHC 80-V-34 Advance Reports (U.S. Bureau of the Census, March 1981)	2
J. Passel, J. Siegel & J. Robinson, *Coverage of the National Population by Age, Sex and Race in the 1980 Census: Preliminary Estimates by Demographic Analysis* (U.S. Bureau of the Census, November 1981)	2, 8
United States Final Population and Housing Unit Counts, PHC 80-V-1 Advance Reports (U.S. Bureau of the Census, March 1981)	2

No. 81-752

IN THE

Supreme Court of the United States

October Term, 1981

HUGH L. CAREY, *et al.*,

Petitioners,

—against—

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONERS

I.

The questions presented on this Petition for a Writ of Certiorari must be considered against a background of four undisputed propositions, each of which is ignored by the Government's Brief in Opposition.

First, New York's population was disproportionately undercounted in the 1980 Census. This fact was found by the district court on the basis of evidence entirely unaffected by the preclusion order, and that finding was not challenged by the Second Circuit. Moreover, it has been confirmed in subsequent public statements by the Census Bureau. For example, the Bureau concedes that the 1980 Census missed 7.5% of Black

males and 2.1% of Black females, while *over*-counting men and women of white and other races by 0.5% and 1.7%, respectively.[1] Indeed, the disproportionality between White and Black Census counts—which is the core issue in this case—admittedly has increased.[2] The particular significance for New York of the Black undercount and the non-Black overcount is obvious from the Bureau's determination that Blacks constituted 25.2% of New York City's population but only 11.7% of the national population.[3]

Second, the only courts that have considered the question have held that the Constitution not only permits, but requires, Census counts to be adjusted when doing so will make those counts more accurate.[4] No court has held to the contrary. This

---

[1] J. Passel, J. Siegel & J. Robinson, *Coverage of the National Population by Age, Sex and Race in the 1980 Census: Preliminary Estimates by Demographic Analysis* at Table 1 (U.S. Bureau of the Census, November 1981) (*"Coverage"*) (cited in Respondents' Brief in Opposition at 14).

[2] The Bureau's Brief in Opposition in *Young v. Baldrige*, No. 81-867, asserts that from 1970 to 1980 there was "a reduction of between 30 and 40%" in the undercount rate for Blacks. (*Id.* at 8, 21) The Bureau fails to tell this Court that, applying the same arithmetic methodology, the level of non-Black undercount was reduced by more than 170%. Hence the relative position of Blacks in the Census has worsened, as indeed the Bureau anticipated it might. As one expert warned at a Bureau conference on the undercount:

> "Don't be surprised if you get something like an overcount of whites and an undercount of Blacks with therefore an impossible to compute differential except in absolute terms or something that might go far beyond the 4 to 1 of 1970. Don't be surprised." (Court of Appeals Appendix ("C. A. App.") at 3712)

[3] United States Final Population and Housing Unit Counts, PHC 80-V-1 Advance Reports (U.S. Bureau of the Census, March 1981); New York Final Population and Housing Unit Counts, PHC 80-V-34 Advance Reports (U.S. Bureau of the Census, March 1981). *See also* Pet. at 5.

[4] *Carey v. Klutznick* (Pet. App. at B-16 to B-18); *Young v. Klutznick*, 497 F. Supp. 1318, 1336 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981), *petition for certiorari filed sub nom. Young v. Baldrige* (No. 81-867).

proposition is of particular importance because the Census Bureau, although it had used statistical adjustments to add almost five million people to its official counts in the 1970 Census,[5] embarked on the 1980 Census under the misapprehension (whether genuine or feigned) that adjustment was prohibited.[6] In short, the Census Bureau conducted the 1980 Census under a mistaken legal premise which had the inevitable effect of making the result less accurate than is constitutionally required.

Third, upon a full hearing of the evidence (and without any possible taint from the preclusion order) the district court concluded that the accuracy of the 1980 Census count could be improved by rational and scientific adjustment methods available to the Census Bureau. (Pet. App. at D-23 to D-24) The district court in *Young v. Baldrige* reached the same conclusion. *Young v. Klutznick, supra,* 497 F. Supp. at 1329-31. Neither the Second Circuit nor the Sixth Circuit took issue with this conclusion.

Fourth, it is undisputed that the relief ordered by the district court and vacated by the Second Circuit was, for all practical purposes, limited to a direction that the Census Bureau adjust its figures for New York in "a reasonable and scientific manner" to the extent necessary to remedy such undercount as might be found upon the Bureau's analysis of its data. (Pet. App. at E-2) In short, the final judgment did no more than determine that the Bureau must use those statistical devices which it had thought it was legally barred from using to achieve the constitutional objective—*i.e.,* a Census that counts "as nearly as is practicable" the whole number of persons in each state. *See Wesberry v. Sanders,* 376 U.S. 1, 7-8 (1965). Under that judgment, New York could receive no more than its due, and the district court carefully refrained from undue intervention into the affairs of the Bureau.

It is against this background that this Court should consider the importance of the questions presented.

---

[5] *See* Pet. at 5-6.

[6] Court of Appeals Exhibit Appendix ("C.A. Ex. App.") at 1954; *see also id.* at 94, 669, 671.

II.

The Brief in Opposition fails to address the fundamental issue underlying the decision below. That issue, characterized by the Second Circuit as "the question presented" by this litigation, was "whether one state can be granted ... an increase [in Congressional representation] without full consideration having been given to its effect on other states." (Pet. App. at I-8) The court of appeals suggests that this case presents a controversy in which all other states (and perhaps substate political units[7]) have "an interest of such a nature that a final decree cannot be made without affecting that interest". (Pet. App. at I-8) That view, and the inapplicable or impossible suggestions advanced by the Second Circuit for implementing it, creates a wholly unjustifiable barrier to the prompt vindication of New York's constitutional rights. Moreover, the correctness *vel non* of that view does not hinge on the correctness of the district court's preclusion order. If the district court were required to consider the "interests" of other states at all, it was required to consider those interests for all purposes, and not just in connection with the preclusion order.

In any event, as we have demonstrated (Pet. at 18-24), the Second Circuit was wrong in concluding that other jurisdictions have any legally cognizable interest in perpetuating an inaccurate Census count of New York's population. The decision below is inconsistent both with this Court's apportionment decisions and with all cases to date that have entertained challenges on the merits to the Census.

III.

The Brief in Opposition ignores petitioners' central constitutional claim. The Bureau asserts that petitioners' claims of malapportionment relate only to "the intrastate redistricting process" for "seats within the State". (Brief in Opp. at 6) That is simply not true, as the Bureau itself told this Court last week in *Young v. Baldrige*:

> "[T]he plaintiffs in the New York census case did contend that at least one additional Representative should have

[7] *See* Pet. App. at I-11.

been apportioned to that State, and it was on this basis that the Second Circuit found that they had standing. *Carey v. Klutznick,* 637 F.2d 834, 838 (1980)." *Young v. Baldrige,* No. 81-867, Brief for the Respondents in Opposition at 15 n.7.

Petitioners' constitutional claim provides the essential context in which the Bureau's assertion of privilege for its address lists must be analyzed. The Bureau's claim is, of course, based entirely on its expansive interpretation of section 9 of the Census Act. But the broad reading that the Bureau would give that statutory privilege must be considered in light of constitutional rights going to the very core of representative democracy in this country. *See McNichols v. Baldrige,* No. 80-1781, Brief of Amici Curiae, the State of New York, *et al.* at 25-29.

The rationale for the Bureau's claim of absolute privilege for address lists rests on the tenuous premise that disclosure—even under the strict protective provisions of the district court's order (Pet. App. at F-4, F-5)—would "chill" public cooperation with the Census in future decades. While the Bureau concedes that the information sought by petitioners "is not inherently private at all" and could be obtained by anyone "walking down the street and making inquiries", it asserts that the "public is not going to be sophisticated enough to differentiate between one form of disclosure and another". (*McNichols v. Baldrige, supra,* Tr. of Oral Argument at 21, 23, 35)

If perceptual matters are to be taken into account, it is surely more relevant to consider the impact of judicial findings and widespread local media reports of Census inaccuracy and mismanagement in 1980. At least it seems reasonable to suppose that the public perception of Census inaccuracy and mismanagement, far more than any supposed confidentiality problems, will erode both the public's willingness to cooperate with the Census and its trust in the Census as a key component in the allocation of political power.

When one considers the circumstances giving rise to the Bureau's expressed concern about the public perception of

confidentiality, one might infer that it is actually an argument of convenience designed to shield the Bureau from judicial scrutiny. The Bureau refused to supply address lists even though the discovery order, in this case as in *McNichols,* incorporated protective provisions more stringent than those under which trade secrets worth millions of dollars are regularly disclosed in litigation.[8] Furthermore, the lists were readily available to more than 275,000 temporary employees hired by the Bureau to conduct field operations. Moreover, while declining to permit inspection of its lists, even on a highly restricted basis, the Bureau concurrently resisted the district court's order that it check New York City's computerized list of 1.2 million welfare recipients against the Bureau's records to determine how many had been omitted from the count.[9] In short, the conclusion seems inescapable that the Bureau has been more concerned to forestall a justified perception of inaccuracy than an unwarranted perception of non-confidentiality.

The Bureau's claim of privilege also rests on flawed legal reasoning. The Bureau claims that various cases and non-judicial interpretations support its privilege claim. (*See McNichols v. Baldrige, supra,* Brief for Respondents at 20, 26-30; Tr. of Oral Argument at 67) None of those precedents, however, is on point in this case. In all of the precedents on which the Bureau relies, including *St. Regis Paper Co. v. United States,* 368 U.S. 208 (1961), Census records were sought by a party that intended to use them for some purpose unrelated to that of enumerating the population (*e.g.,* defending or prose-

[8] The district court's order here (Pet. App. at F-4, F-5) provided for the redaction of the lists to remove the names of the persons enumerated, provided that the data should be used "solely for the purpose of helping to ensure an accurate count", and required that those given access be sworn to the same oath of confidentiality provided for Bureau employees under 13 U.S.C. §23(c), which specifically authorizes the use of employees of State and local agencies and of private organizations for Census purposes.

[9] The still incomplete results of this checking confirmed the finding of substantial undercounting even after all Census procedures had supposedly been carried out. (*See* Pet. at 6)

cuting a lawsuit not otherwise involving the Bureau). In all such cases, the Bureau happened to be a convenient repository of information which had been collected from many people, and which the requestor presumably could have sought from the same people. In this case, by contrast, Census records were sought (and by court order were to be used) for no purpose other than enumeration of the population as mandated by the Constitution. Indeed, in declining to comply with the district court's discovery order, the affidavit of Vincent Barabba, Director of the Bureau during the 1980 Census, conceded that "we and plaintiffs have the same ultimate goal in mind; *i.e.*, enumerating everyone . . . ." (C.A. App. at A-320) Disclosure of the address lists thus admittedly would serve "the statistical purposes for which [information] is supplied" to the Bureau, 13 U.S.C. §9(a)(1), and is consistent with confidentiality provisions of the Census Act.

The most important factor in assessing the Bureau's privilege claim, however, remains the profound constitutional interest in a Census that is as accurate as practicable. Relatively speaking, the confidentiality interests invoked by the Bureau must be of a lower order: They are statutory rather than constitutional; they are perceptual rather than substantive; and the harm that might result—Census incompleteness—is speculative, unlike the actual census inaccuracy proven by petitioners. The basic constitutional function of the Bureau is the collection of accurate data for the allocation of political power. Yet invoking claims of privilege and expertise, the Bureau blinks the omission in New York of a population (conservatively estimated without reliance on evidence affected by the preclusion order (Pet. App. at D-14)) greater than that of the entire population of each of eight states and the District of Columbia. The magnitude of that undercount starkly demonstrates that the Census is a function that is too important under our constitutional system to be left to the unreviewable discretion of an Executive bureau.

Finally, although the Bureau attempts to make this case turn on the discovery question argued earlier this Term in

McNichols v. Baldrige, supra, that discovery issue is, at best, of limited importance here. As demonstrated in our petition, the district court's conclusion that New York was undercounted rested on two independent findings: (1) that there was an "endemic" undercount that affected New York to a greater extent than the nation as a whole due to the unique demographic and sociological characteristics of New York (Pet. at 7-9); and (2) that the Bureau grossly mismanaged the 1980 Census in New York (Pet. at 9-10). These two sources of undercounting were alleged in separate counts of the complaint, and, as the Bureau concedes, were "unrelated". (Brief for Defendants-Appellants in the Second Circuit, January 23, 1981, at 34)[10]

Thus, even assuming that the Bureau was incorrectly precluded from offering evidence to rebut petitioners' mismanagement claims, that evidence would not have changed the district court's decision. That decision, and the order to adjust for the undercount, rested independently on proof of the endemic undercount—proof that the Bureau could and did attempt to rebut.[11] On the other hand, the Bureau's offer of the

---

[10] Petitioners' evidence of mismanagement was primarily directed at obtaining prospective relief to improve the Bureau's conduct of the Census while the enumeration process was still ongoing. Of course, the usefulness of prospective relief significantly waned when that process ended.

[11] The Bureau (Brief in Opp. at 13 n.6) chastizes petitioners for their characterization of the evidence with respect to the overcount of non-Blacks. In particular, it asserts that an article cited in the Petition "is not a Census Bureau publication at all" but only "an independent paper prepared by a Bureau employee and a university professor" (*id.*). The "Bureau employee", however, is in fact Barbara Bailar, one of the Bureau's top officials (Associate Director for Statistics and Methodology) and a principal witness for the Bureau at trial. Moreover, the table in the article to which we specifically referred did indeed come directly from a Bureau publication, as respondents concede.

Respondents' further assertion that that table reflects "preliminary estimates of an undercount rate for Black males and females but *contains nothing whatever* relating to Bureau studies on a net overcount of Whites" is plainly wrong. The table expressly shows net undercounts for Blacks and net overcounts for "White and other races". *Coverage* at Table 1. As summarized in the Bailar article:

proof as to which it was precluded was expressly addressed only to disproving petitioners' mismanagement claims. For example, the Bureau's chief trial attorney represented that "all" of the witnesses who were precluded would "rebut the specific allegations of count 1 of the complaint [the mismanagement claims], and all testimony offered by the plaintiffs in this trial in support of those allegations." (C.A. App. at A-3526, A-3533)

"Over all ages, there is an overcount for white and other races women and men." The proposition that non-Black overcounting is "often related to affluence" (Pet. at 5) is amply supported in the record (*see* C.A. Ex. App. at 5037-39). The record also supports the proposition that overcounting has occurred most frequently in the Western part of the United States (C.A. Ex. App. at 5037), and was expected by the Bureau to occur more frequently in rural areas than in large cities (C.A. App. at 3724-25).

Conclusion

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

February 1, 1982.

Respectfully submitted,

ROBERT S. RIFKIND
CRAVATH, SWAINE & MOORE
Attorneys for all petitioners except Hugh L. Carey and the State of New York
One Chase Manhattan Plaza
New York, N. Y. 10005
(212) 422-3000

DAVID A. BARRETT
JOHN A. REDMON
ALAN R. GLICKMAN

ROBERT ABRAMS
Attorney General of The State of New York
Attorney for Hugh L. Carey and The State of New York
Two World Trade Center
New York, N. Y. 10047
(212) 488-7511

PETER BIENSTOCK
DANIEL BERGER

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of The City of New York
Attorney for The City of New York and Edward I. Koch
100 Church Street
New York, N. Y. 10007
(212) 566-3300

MARY MCCORRY

Of Counsel